(20,810.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 145.

MATHILDE VON ELLERT SISTARE, PLAINTIFF IN ERROR,

vs.

HORACE RANDALL SISTARE.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

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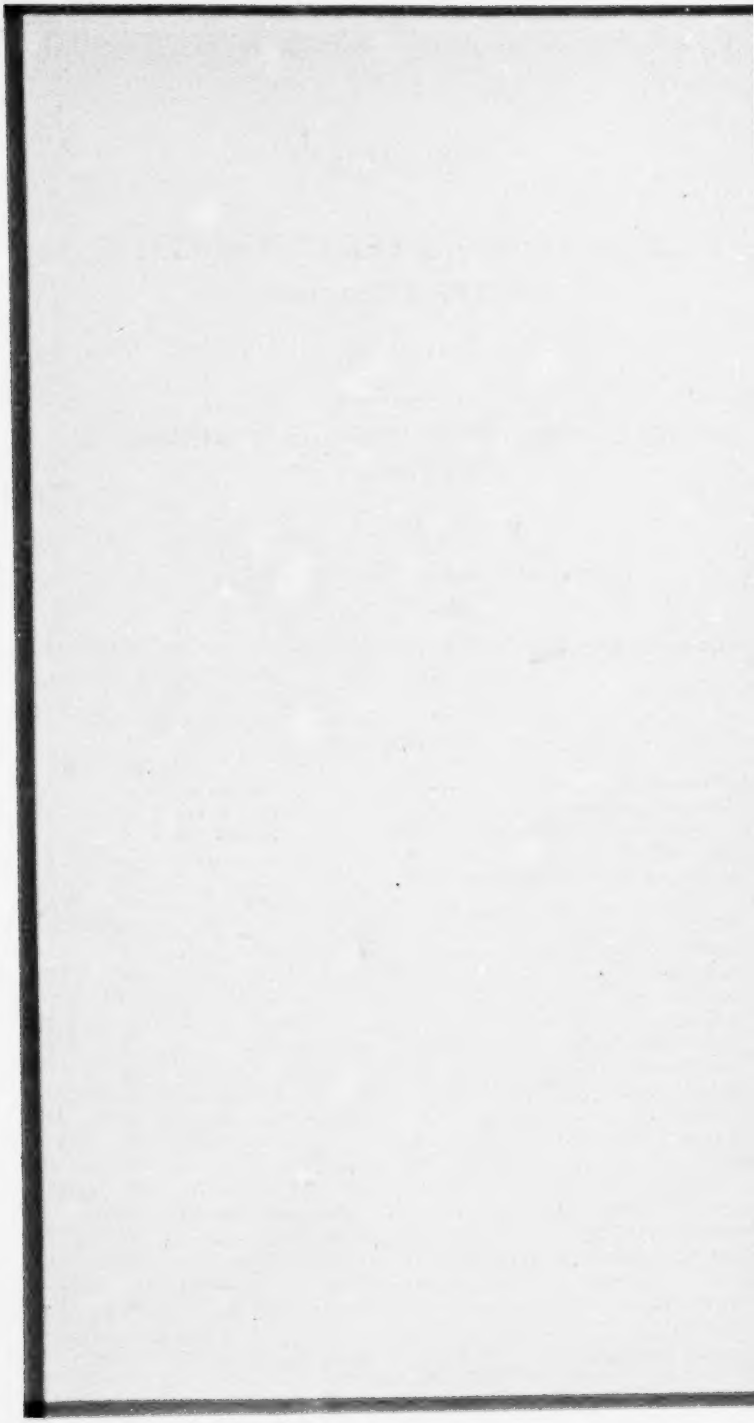

1 Supreme Court of Errors, Second Judicial District, New London County, April Term, 1907.

Superior Court, New London County, February Session, A. D. 1907.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

To the Sheriff of the County of New London, his Deputy or either Constable of the Town of New London, within said County, Greeting:

By authority of the State of Connecticut, you are hereby commanded to attach to the value of twelve thousand dollars the goods or estate of Horace Randall Sistare, of the City of Newark, in the State of New Jersey, having property and estate in the County of New London, State of Connecticut, and him summon to appear before the Superior Court to be holden in and for the County of New London on the first Tuesday of September, A. D. 1904, then and there to answer unto Mathilda Von Ellert Sistare, of the Borough of Manhattan, City and State of New York, in a civil action wherein the plaintiff complains and says:

1. On July 22, 1899, at the City and State of New York in the New York Supreme Court of said State of New York in an action therein pending between the plaintiff and defendant it was duly adjudged that the defendant should pay the plaintiff the sum of $22.50 per week on each and every Monday after the passage of said judgment or decree in accordance with the provisions of said judgment or decree which is hereunto attached, marked Exhibit "A" and made a part of this paragraph.

2 2. Said judgment or decree remains in full force and effect.

3. The defendant has not paid the sum called for by said judgment or decree.

4. There is now due to the plaintiff the sum of $8,500, which remains wholly unpaid.

Plaintiff claims $10,000. damages.

And you are hereby further commanded to leave a true and attested copy of this writ and of the accompanying complaint at least twelve days before the session of the Court to which it is made returnable with William B. Coit, Administrator of the estate of Robert Coit, deceased, who was trustee of the estate of Abner Bassett, deceased, late of said New London, or at his usual place of abode as he is the agent, trustee and debtor of said defendant and has concealed in his hands the goods, effects and estate of said defendant and is indebted to him. And you are further commanded to summon said garnishee to appear before said Court at the time and place first mentioned then and there to disclose on oath whether he has concealed in his hands goods, effects or estate of said defendant or is indebted to him.

Benjamin Slade, of New Haven, is recognized in $75. to prosecute, etc.

Of this writ with your doings thereon make due service and return.

Dated at New London, Connecticut, this 11 day of July, A. D. 1904.

CHAS. B. WHITTLESEY,
Justice of the Peace.

3 EXHIBIT "A."

At a Special Term of the Supreme Court of the State of New York, held in and for the County of New York, at Part IV thereof, in the County Court House in the County of New York, on the 22nd day of July, 1899.

Present: Hon. Leonard A. Giegerich, Justice.

MATHILDE VON ELLERT SISTARE, Plaintiff,
against
HORACE RANDALL SISTARE, Defendant.

Judgement of Separation.

This action having been begun by the service of the summons herein on the defendant personally in the Borough of Manhattan, City of New York, on the 31st day of October, 1898, and the defendant thereafter, and on the 19th day of November, 1898, duly appeared herein by Dowe, Murray and Hartridge, Esqs., his attorneys, and the complaint having thereafter and on the 7th day of February, 1899 been duly served on said attorneys of the defendant, and the defendant thereafter by his said attorneys served an answer herein on the 20th day of March, 1899, and the issues in this action having been regularly brought on for trial at a Special Term, Part IV of this Court, held for the trial issues by Honorable Leonard A. Giegerich, Justice, at the County Court House, in the City and County of New York, on the 19th, 20th, 21st, 22nd, 23rd, 26th, 28th, 29th, and 30th days of June, 1899, and the 5th, 6th and 7th days of June, 1899, and the Court having heard the allegations, proofs and testimony of the respective parties, and after due deliberation, having duly made and filed on the 22nd day of July, 1899, its decision herein, hereto annexed, and having thereby directed judgment in favor of the plaintiff and against the defendant as hereinafter stated; and the plaintiff's costs having — duly adjusted at One hundred and seventeen and 67/100 Dollars ($117.67), now on motion of Norwood & Dilley, Esqrs., attorneys for the plaintiff, it is

Ordered, adjudged and decreed that the plaintiff be, and she
4 hereby is forever separated from the defendant, and from the bed and board of the said defendant, on the ground of non-support and cruel and inhuman treatment by the defendant. And it is

Further ordered, adjudged and decreed that from and after the entry of this decree, the defendant, Horace Randall Sistare, pay to

the plaintiff, Mathilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of Twenty-two and 50/100 Dollars ($22.50) per week, such sum to be paid into the hands of her attorneys of record in this action, on each and every Monday. And it is further

Ordered, adjudged and decreed that the sole care, custody, control and education of said minor child, Horace Von Ellert Sistare is hereby awarded to the plaintiff, and the defendant upon complying fully with each and all of the directions of the decree herein, and not otherwise, and during his good behavior, shall, until the further order of this Court, be permitted to see said child for the space of two hours, between the hours of ten and twelve o'clock in the forenoon on Wednesdays and Saturdays, excepting Wednesdays and Saturdays during the months of July, August and September of each year. And it is further

Ordered, adjudged and decreed that costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of One hundred and seventeen and 67/100 dollars ($117.67) and that the plaintiff do recover said costs from the defendant and have execution therefor. And it is further

Ordered, adjudged and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of this judgment as may be necessary for its enforcement, and for the protection and enforcement of her rights in the premises.

Enter.

L. A. G., *Jus.*
WM. SOHMER, *Clerk.*

Filed Aug. 10, 1905.

JOHN C. AVERILL, *Clerk.*

5 Superior Court, New London County, March 7, 1905.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Demurrer.

The defendant demurs to the complaint because:

(1) The so-called judgment or decree which is sought to be enforced is not for the present payment of a definite sum of money and cannot be enforced by an action at law in this State.

(2) The order included by reference in the complaint and constituting the alleged judgment or decree is not a judgment which is entitled to full faith and credit in this State and which may be enforced by action here.

(3) Said order does not constitute a debt or other obligation from the plaintiff to the defendant which may be enforced in an action of this character but the same can only be enforced by the Court which granted it.

(4) It is not alleged that said order is not temporary and subject to modification, at any time, by the Court which granted it.

THE DEFENDANT,
By BRANDEGEE, NOYES & BRANDEGEE,
His Attorneys.

Filed March 9, 1905.

JOHN C. AVERILL, *Clerk.*

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Mem. on Demurrer.

The demurrer to the complaint is overruled.

The plaintiff may recover in this action the amount already due and unpaid on the order and decree of the New York Court. The fact, if it be a fact, that the order is temporary and subject to modification at any time is a matter of defense, but until modified it stands as valid judgment against the defendant.

SHUMWAY, *J.*

Nov. 27th, 1905. JOHN C. AVERILL, *Clerk.*

6 Superior Court, New London County, the 4th day of January, 1906.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Answer.

First Defense.

The defendant denies the truth of the matters contained in the plaintiff's complaint.

Second Defense.

The order which is sought to be enforced in this action is not a final judgment for a fixed sum of money but is an order subject to be modified by the Court which granted it and cannot be enforced in an action of this character in this State.

Third Defense.

The order which is sought to be enforced in this action does not constitute a debt or other obligation from the plaintiff to the defendant and cannot be enforced in an action of this character but can only be enforced by the Court which granted it.

THE DEFENDANT,
By BRANDEGEE, NOYES & BRANDEGEE,
His Attorneys.

Filed Jan. 5, 1906.

JOHN C. AVERILL, *Clerk.*

Superior Court, New London County, January 15th, 1906.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Reply.

The plaintiff in the above entitled cause denies the truth of the matters set up in the second and third defenses of the defendant's answer.

PLAINTIFF,
By CHAS. B. WHITTLESEY,
SLADE, SLADE & SLADE,
Her Attorneys.

Filed Jan. 16, 1906.

JOHN C. AVERILL, *Clerk.*

7 New London County, Superior Court, February 15th, 1907.

MATHILDE V. E. SISTARE
vs.
HORACE R. SISTARE.

Memorandum.

The Court in its decision of the defendant's demurrer to the complaint held the complaint to be sufficient upon the ground that the New York order, judgment or decree which is counted on and made part of the complaint stands as a valid judgment against the defendant until modified; and that if it is temporary and subject to modification and has been modified those facts must be pleaded as a defense if relied upon. This view is supported by some of the authorities while others, and good ones, hold that such a judgment is not a final judgment and within the full faith and credit clause of the U. S. constitution and cannot be made the foundation of an action in a sister state. The defendant has answered over and has coupled with his general denial a so-called second and third defense whereby, without alleging any modification of the order of the New York Court and without introducing any testimony, he attempts to raise the same questions raised by the demurrer and asks a different decision of them. The Court was bound to take judicial notice of the statutes and decisions of New York upon the issue of law raised by the demurrer. Huntting *vs.* Hartford St. Ry. Co., 73 Conn., 181, Fish, *et al.*, *vs.* Hartford, 69 Conn., 390, 391, Donovan *vs.* Hartford St. Ry. Co., 65 Conn., 214. It was asked to do so by the defendant. He now asks the Court to take judicial notice of those statutes and decisions *as evidence* and thus find the issue of fact in his favor. If the law of the case is as established by

the Court in ruling upon the demurrer the issue of fact now claimed to be raised is immaterial because although the judgment is temporary and subject to modification it is yet valid against the defendant and affords the plaintiff a good cause of action in this state. He says that the ruling upon the demurrer was wrong and asks the Court to now rule the other way. Where the Court has ruled upon a question upon conflicting authorities it is poor practice for a succeeding judge in the same Court to change the
8 ruling were he to consider the weight of authority the other way. The defendant's remedy is elsewhere if the decision is erroneous.

The plaintiff has proven the allegations of her complaint—that the order judgment or decree set up in the complaint was passed by the Supreme Court of the State of New York on July 22nd, 1899, and that none of the weekly payments had been paid up to the time of bringing this action and until the taking of the depositions therein, January, 1906. No allegation or claim as to costs taxed in the N. Y. action is made in the complaint and no reference to them is made in the depositions and argument. Judgment is for the plaintiff for the sum accrued for weekly payments for the two hundred and fifty-eight weeks elapsed between the date of the judgment sued upon and the date of bringing this action, July 11, 1899, $5,805.00 and her costs.

THAYER, *J.*

Filed February 23, 1907.

JOHN C. AVERILL, *Clerk.*

New London County, Superior Court, February 19, 1907.

MATHILDE VON ELLERT SISTARE, of the Borough of Manhattan, City and State of New York,

vs.

HORACE RANDALL SISTARE, of the City of Newark, State of New Jersey.

Judgment.

This action by complaint claiming Ten Thousand ($10,000.00) Dollars damages, came to this Court on the first Tuesday of September, 1904, and thence by continuance to the present time, when the parties appeared and were at issue to the Court, as on file.

The Court having heard the parties finds the issues for the plaintiff.

Whereupon it is adjudged that the plaintiff recover of the defendant Five Thousand Eight Hundred and Five ($5,805.00) Dollars damages, and her costs taxed at —— Dollars and —— Cents.

By the Court,

JOHN C. AVERILL, *Clerk.*

9 Superior Court, New London County, Feb. 21st, 1907.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Notice of Appeal.

The defendant in the above entitled cause hereby gives notice that he appeals from the judgment rendered therein to the Supreme Court of Errors in and for the Second Judicial District at the term thereof next to be held after the filing of said appeal.

THE DEFENDANT,
By BRANDEGEE, NOYES & BRENNAN,
His Attorneys.

Filed February 21, 1907.

JOHN C. AVERILL, *Clerk.*

New London County, Superior Court, February 23, 1907.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Finding.

1. On July 22, 1899, in an action between the parties to this action a judgment of separation was rendered in the Supreme Court of the State of New York in favor of the present plaintiff as plaintiff therein. A copy of said judgment is attached to the complaint as Exhibit A.

2. The weekly payments of $22.50 per week required by said judgment have not been paid and such payments for the period of 258 weeks which elapsed between the date of the rendition of said judgment and the date of the commencement of this action amount to $5,805.00.

3. No evidence was offered or claim made respecting the costs taxed and allowed in said judgment.

4. Upon the trial the attention of the Court was called to, and the Court was asked to take judicial notice of the provisions of the code of judicial procedure of the State of New York existing
10 at the time of the rendition of said judgment relating to actions for divorce and separation; to judgments and orders in such actions and to the methods of enforcing them.

5. The defendant made the following claims of law as to the judgment to be rendered in this action:—

(*a.*) That the judgment rendered by the Supreme Court of the State of New York in requiring the future payment of $22.50 per week did not constitute a final judgment for a fixed sum of money which is enforceable and collectible in this action.

(*b.*) That said judgment being subject to modification by the Court which granted it, is not a judgment which the Courts of this state will enforce.

(*c.*) That the requirement that said sums of money should be paid as aforesaid does not constitute a debt or obligation from the defendant to the plaintiff which can be enforced in this action.

(*d.*) That said judgment requiring the said weekly payments cannot be enforced in any other way than according to the procedure prescribed in the statutes of the State of New York and cannot be enforced in this action.

(*e.*) That the judgment which is sought to be enforced in this action is not a final judgment entitled to full faith and credit in this state by virtue of the provisions of the Constitution of the United States.

(*f.*) That the judgment which is sought to be enforced in this action will not be enforced by the Courts of this state through comity.

(*g.*) That the facts will not support a judgment for the plaintiff.

6. The Court did not so rule but overruled said claims and rendered judgment for the plaintiff as on file.

THAYER, *J.*

Filed Feb. 23, 1907.

JOHN C. AVERILL, *Clerk.*

11 Superior Court, New London County, February 26th, 1907.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Defendant's Appeal.

In the above entitled cause the defendant appeals from the judgment of said Superior Court to the Supreme Court of Errors next to be holden within and for the Second Judicial District at Norwich on the last Tuesday of April, 1907, for the revision of errors which he claims to have arisen on the trial thereof; and for reasons of appeal the defendant assigns the following:

1. The Court erred in overruling the defendant's demurrer to the complaint.

2. The Court erred in overruling the claims of law made by the defendant upon the trial and marked (*a*), (*b*), (*c*), (*d*), (*e*), (*f*) and (*g*) in paragraph 5 of the finding.

3. The facts set forth in the finding do not support the judgment rendered or the conclusions of the Court.

The defendant prays, therefore, for such relief as is provided by law in the premises.

THE DEFENDANT,
By BRANDEGEE, NOYES & BRENNAN,
His Attorneys.

I certify that the foregoing appeal was filed on the 26th day of February, 1907, and William J. Brennan, of New London, is recognized in the sum of $100 conditioned that the said Horace Randall Sistare shall prosecute said appeal to effect and pay all costs therein if he shall fail so to do; and said appeal is hereby allowed.

JOHN C. AVERILL, *Clerk.*

A correct copy of record of the Superior Court.
Attest:

JOHN C. AVERILL, *Clerk.*

A correct copy of record of the Supreme Court of Errors.
Attest:

JOHN C. AVERILL, *Clerk.*

12 Superior Court.

No. 2.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Defendant's Appeal.

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13 Supreme Court of Errors, Second Judicial District, Norwich, April Term, 1907.

MATHILDE VON ELBERT SISTARE
vs.
HORACE RANDALL SISTARE.

Action to recover upon a New York decree granting periodical payments for future maintenance, brought to the Superior Court in New London County; demurrer to complaint overruled, Shumway, J.; facts found and judgment rendered for the plaintiff to recover $5,805, by the court, Thayer, J., and an appeal by the defendant. *Error, judgment set aside, and judgment for defendant ordered.*

In 1899 the plaintiff was by the courts of New York granted a separation from the defendant, her husband, and awarded the custody of their minor son. By the judgment it was further ordered, adjudged and decreed that the defendant from and after the entry thereof should pay to the plaintiff for her maintenance and support and the maintenance and education of said son the sum of $22.50 per week, to be paid into the hands of the plaintiff's attorneys of record on each and every Monday. It was further ordered, adjudged and decreed that the plaintiff have leave to apply from time to time for such orders at the foot of the judgment as might be necessary for its enforcement and for the protection and enforcement of her rights in the premises.

Section 1771 of the New York Code of Civil Procedure then in force under which this order for payments to the wife for her benefit and that of her son was made, provided that in actions for a separation the court might either in the final judgment or by orders made from time to time before such judgment, give such directions as justice required between the parties for the custody, care, education and maintenance of any of the children of the marriage, and where the action should be brought by the wife, for her support. It
14 was further provided that the court might upon the application of either party, after due notice to the other, by order annul, vary or modify such directions. The right of the defendant to make such an application was conditioned upon leave of court to make it having been first obtained. Section 1772 provided that the court might require the husband to give security for the payments which he might be directed to make as aforesaid, and that in case of a failure on his part to make payments or give security as directed his personal property and the rents and profits of his real property might be sequestered, a receiver thereof appointed, and the property thus sequestered applied under the direction of the court to the satisfaction of the payments ordered as justice should require. Section 1773 further provided that where a husband was in default of his payments and it appeared presumptively that the proceedings specified in § 1772 would be ineffectual, the court might

in its discretion institute proceedings against him for his punishment for contempt.

The defendant made none of the payments required of him by said order and decree, and this suit was brought to recover the amount in arrears, which at the commencement of the action was $5,805. Judgment for that sum was rendered.

The complaint recited the issuance of the order and its terms in full, that it still remained in full force and effect, and that payments had not been made as ordered to the amount of $8,500, and prayed for judgment for $10,000 damages. The defendant demurred for the reasons that the so-called judgment or decree sought to be enforced was not one for the present payment of a definite sum of money and therefore could not be enforced in this State, that it did not create a debt or obligation which was enforceable in action of the character of the present, but only by the court which issued it, and that it was not such a judgment as was entitled to
15 full faith and credit in this State and enforceable by action here. This demurrer was overruled, whereupon the defendant answered over. Upon the trial the same questions which were presented upon the demurrer were again presented. The trial court, however, accepted the rulings upon the demurrer as the law of the case and upon the facts found rendered judgment as stated.

Walter C. Noyes, for the appellant (defendant).

Benjamin Slade, for the appellee (plaintiff).

PRENTICE, *J.*:

The nature, operation and effect within the State of New York of orders like that in question directing payments *in futuro* to a wife by a husband living in judicial separation and passed in 1899 pursuant to the then provisions of statute have been well settled by the repeated decisions of the courts of that jurisdiction. They have been declared to be tentative provisions which remain at all times within the control of the court issuing them and subject to being at any time modified or annulled. Tonjes *v.* Tonjes, 14 App. Div. 542. The right of modification or annulment which is thus reserved to the court is one which extends to overdue and unsatisfied payments as well as to those which may accrue in the future. Sibley *v.* Sibley, 63 App. Div. 552; Goodsell *v.* Goodsell, 94 App. Div. 443; Kiralfy *v.* Kiralfy, 36 Misc. 407; Wetmore *v.* Wetmore, 34 Wis. 640. "The amount awarded does not exist as a debt in favor of the wife against the husband in the sense of indebtedness as generally understood." Tonjes *v.* Tonjes, 14 App. Div. 542. The order is not one "which simply directs the payment of a sum of money," and not such an one as can have enforcement by execution. Weber *v.* Weber, 93 App. Div. 149. The special remedies provided in §§1772 and 1773 for the enforcement of the orders are exclusive. Weber *v.* Weber, *supra;* Branth *v.* Branth, 20 Civ. Pro. 33. No judgment in another court can be entered upon them. Branth *v.* Branth, *supra.*

16 Such being the character of the order before us as declared by the courts of the jurisdiction from which it comes, the conclusion would seem inevitable not only that the courts of this

State are under no constitutional obligation to give effect to it in the manner here sought, but ought not, as an act of comity, to do so, since it would thus be given a greater effect than would be given to it in the jurisdiction of its origin. McElmoyle *v.* Cohen, 13 Peters, 312, 326; Mills *v.* Duryee, 7 Cranch, 481; Bank *v.* Wheeler, 28 Conn. 433, 439.

But we are not left without authoritative declarations as to the extra-territorial value of this New York decree. A Mrs. Lynde was by the Court of Chancery of New Jersey granted a separation from her husband, and it was adjudged that she was entitled to recover $7,840 as alimony then due and payable and that her husband pay to her permanent alimony at the rate of $80 a week from the date of the decree. The statutes of New Jersey contained no express reservation of power to the court to modify or annul allowances of alimony so made, but the courts had said that they exhibited the intention that the subject should be continuously dealt with according to the varying conditions and circumstances. Rev. Stat. of New Jersey, II, p. 1269 *et seq.*; Lynde *v.* Lunde, 54 N. J. Eq. 473, 476. As to the methods of enforcing such decrees the New Jersey statutes contained substantially the same provisions for security, sequestration and receivership proceedings as were embodied in the New York code when the order in the present case was made as recited in the statement of facts. It thus appears that the provision for the payment of future alimony to Mrs. Lynde in New Jersey was affected by no condition which did not equally affect that to Mrs. Sistare in New York. There was the same reserved power of modification only the more clearly and emphatically expressed, and the same provision of special remedies which the New York courts had
17 gone so far as to declare to be exclusive. Mr. Lynde having failed to make any of the payments required of him, Mrs. Lynde brought suit against him in the courts of New York for the recovery of both the $7,840 and the amount of the accrued weekly payments. The appellate courts of that State, whose decisions have special interest as embodying the views prevailing in the jurisdiction from which the order before us comes, and the Supreme Court of the United States, to which the case was finally taken upon the Federal question involved, concurred in holding that the award of $7,840 created a debt of record to which full faith and credit should be given in the courts of a sister State and that the order for future payments did not create such a debt and did not constitute such a judgment or judicial proceeding as was within the purview of §1, Article Fourth, of the Constitution of the United States. Lynde *v.* Lynde, 41 App. Div. 280, 162 N. Y. 405, 181 U. S. 187. The conclusion thus reached is succinctly stated and the reasons therefor sufficiently indicated in the language of the opinion of the Federal court as follows: "The decree for the payment of $7,840 was for a fixed sum already due and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey which it might at any time alter and was not a final judgment for a fixed sum."

In respect to any claim which might be made that although the

courts of this State are under no obligation to enforce the present New York decree they should as an act of comity do so, the opinions in the cases referred to suggest a sufficient answer to it when they note the inconclusive character of a decree which remains subject to change in the discretion of the court rendering it, and further invoke the elemental principle that collateral remedies provided in one State for the enforcement of its decrees cannot be carried over into another jurisdiction and there utilized. "The provision
18 for a bond, sequestration, receiver, and injunction, being in the nature of execution and not of judgment, could have no extra-territorial operation; but the action of the courts of New York in these respects depended on local statutes and practice of the State." Lynde *v.* Lynde, 181 U. S. 187. Our courts are now asked to render a money judgment for the accrued payments as upon a debt of record and to enforce that judgment by execution. To do so involves not only disregarding the discretionary control reserved to the New York Court in respect to both past and future payments, but also giving effect by judgment and execution to a decree which could not, as we have seen, be made the foundation of such a judgment in New York or enforced by execution there.

But it is said that the case of Barber *v.* Barber, 21 How. 582, lays down a doctrine contrary to that expressed in Lynde *v.* Lynde, that this earlier case was not overruled in the later, and that therefore it is to be reckoned with before any statement of the Federal doctrine can be confidently made. A careful examination of the two cases referred to will disclose that neither holds all that is frequently attributed to it, and that when rightly interpreted there is no lack of harmony between them. The Barber case grew out of an allowance of future alimony made to Mrs. Barber by the courts of New York in 1844. Subsequently the husband in judicial separation moved to Wisconsin, where the wife, having found him, brought an action in equity in the United States District Court for the District of Wisconsin to recover the amount of the payments in arrears and judgment was rendered in favor of her contention. The controversy waged in the Supreme Court of the United States concerned the question of jurisdiction and the somewhat extended opinion rendered deals with the various aspects of that question which the majority opinion stated to be "whether a wife divorced *a mensa et thoro* may not have a domiciliation in a State of this Union different from that of her husband in another State to enable her to sue him there by her next friend in equity in a court of the United States to carry into judgment a decree which has been made against him for
19 alimony by a court having jurisdiction of the parties and the subject matter of divorce" (p. 588). As incidental to the discussion of one of the subordinate phases of this general question, the character and effect of the New York decree and its extra-territorial value were touched upon and the statement made that such orders constituted judgments of record and created debts of record enforceable against the husband by execution or attachment against his person issuing from the court which gave it and that actions might be brought in the courts of other jurisdictions to carry them

into judgment and effect. The judgment of the lower court was affirmed.

It is to be noticed that this statement of the court embodies two propositions, to wit: one as to the local character and effect of the New York decree in question, and the other as to the consequent extra-territorial value of it, and that the second of the propositions is plainly predicated upon the first. Therein lies the gist of the decision in respect to the subject now under discussion, for while the language employed is general in its terms it manifestly was used of such orders and decrees absolute in their adjudication, conclusive in their character, and enforceable by ordinary legal processes, as was that under consideration, and as manifestly was not used of every conceivable order and decree relating to future alimony and maintenance. No question was made as to the conclusive character in New York of the decree in question as establishing there a debt of record. No discussion upon that point appears in the opinion and no intimation was made as to what the court would have held had the decree been one of a different character. The absence of any such question or discussion and the unqualified assertion of the first proposition referred to, that is, that the question presented for decision arose upon a conclusive judgment of record enforceable by execution issuing from the court of its origin, is explained when the statutes and decisions of New York are examined and it is found that the assertion was well founded as respects a decree passed in 1844, and for that matter at any time during the next half century.

The courts of New York have no authority in matter of divorce, separation, alimony, etc., save that which is conferred by statute. Erhenback *v.* Erhenback, 96 N. Y. 456; Walker *v.* Walker, 155 N. Y. 77; Livingstone *v.* Livingstone, 173 N. Y. 377. From 1730 to 1894 no authority was conferred upon the New York courts to modify a decree in separation proceedings directing the payment of alimony or an allowance for future maintenance. Once fixed, it remained fixed, except that the decree of separation could be revoked upon the joint application of the parties and the production of satisfactory proof of reconciliation. Ref. Stat. of New York, II, §54; Goodsell *v.* Goodsell, 82 App. Div. 65, 68; Ehrenbach *v.* Ehrenbach, 96 N. Y. 456; Walker *v.* Walker, 155 N. Y. 77, 80. Under such a decree the amount allowed became a vested property right. Livingstone *v.* Livingstone, 173 N. Y. 377. In 1894 and 1895 the legislation which was in force when the present decree was passed and concerning the effect of which the adjudications hereinbefore referred to have been made supplanted that which had previously been upon the statute books. In 1900 an Act was passed expressly making this new legislation with its reservations of the power of modification or annulment at any time applicable to decrees granted prior to 1894. This Act was declared unconstitutional and ineffective as impairing vested rights. Livingstone *v.* Livingstone, 173 N. Y. 377. Allowances of future alimony made prior to 1894 created a judicial debt of record and furnished a proper basis for recovery in another action, Wetmore *v.* Wetmore, 149 N. Y. 520; Moore *v.* Moore 40 Misc. 162; France *v.* France, 79 App. Div. 291, 295.

The opinion in the Barber case after observing that the New York court which granted the decree had the power to enforce it by the issuance of execution, proceeded to express its conclusion
21 as to the extra-territorial value of the decree by saying that when local enforcement could not be had by reason of the husband's departure from the jurisdiction, action could be brought on behalf of the wife in other jurisdictions to carry the decree into judgment there *with the same effect that it had in the State in which the decree was given.* (p. 595.) The last part of the statement has been commented upon as affirming the extra-territorial operation of special collateral remedies and as therefore antagonistic to those portions of the opinion in the Lynde case which touch upon that subject. It is perfectly apparent, however, that the court was speaking of decrees which created fixed debts enforceable by the ordinary judicial processes and that its language was used only to emphasize the fulness of the faith and credit which would be given to such a decree.

It thus appears that while the Barber case is authority for the proposition that a decree directing periodical payments by a husband to a wife living in separation by way of future alimony or maintenance, if it is conclusive in its character and creates a fixed obligation to pay a certain sum of money which will within the home jurisdiction be regarded as a debt of record enforceable by execution issuing from the court which granted it, is one to which extra-territorial effect will be given, it is not authority for the doctrine frequently attributed to it, that all orders or decrees for future alimony regardless of their character will be given such effect. The Lynde case, on the other hand, is authority for the proposition that a decree for the payment of future alimony or maintenance which is inconclusive in its character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at discretion and which is not enforceable in the State of its origin otherwise than by special processes exclusive of execution and judgment thereon and execution is not one creating such a debt of record as will entitle it to or justify extra-territorial enforce-
22 ment. It is not, as has been sometimes *been* assumed, authority for the larger proposition that no decree for future alimony or maintenance, whatever its character, can claim or have enforcement in another State.

The two cases may therefore well stand together as declarative, as far as they go, of authoritative Federal principles. It is quite conceivable that there lies between them no little debateable ground. It is quite possible that the limits to which the doctrine of the Lynde case ought to be carried are not clearly determined. But whatever questions of that kind might be suggested, we are not here concerned with them, since it is apparent that the facts of the present case fill out the full measure of the conditions presented in the Lynde case and bring it within the application of the doctrine there laid down. Our conclusion must therefore be controlled by that decision, adversely to the plaintiff's right to recover.

There is error, the judgment is reversed and the cause remanded for the rendition of judgment in favor of the defendant.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the reporter of the court; but the opinion is subject to alteration and addition by the judges until printed in the official reports.

JAMES P. ANDREWS, *Reporter.*

23 At a Supreme Court of Errors of the State of Connecticut in the Second Judicial District, held at Norwich in the County of New London, on the last Tuesday of April, 1907.

February Session, New London County, 1907.

No. 2.

MATHILDE VON ELLERT SISTARE, of New York, New York,
vs.
HORACE RANDALL SISTARE, of Newark, New Jersey.

On Appeal from the Superior Court.

This appeal by the defendant claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this Court, was allowed by the Clerk of the Superior Court for New London County on the 26th day of February, 1907, and came to this Court at its term at Norwich, on the last Tuesday of April, 1907; when the parties appeared and were fully heard.

And now this Court finds that in the record judgment and proceedings of said Superior Court there is error.

It is therefore considered and adjudged that the said judgment be reversed and the cause remanded for the rendition of judgment in favor of the defendant, and that the appellant recover of the appellee $— costs of suit.

By the Court,

JOHN C. AVERILL, *Clerk.*

24 STATE OF CONNECTICUT,
New London County, Second Judicial District, ss:

I, George E. Parsons, Clerk of the Supreme Court of Errors of the State of Connecticut for the Second Judicial District, hereby certify that the above and foregoing is a true transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, to wit:—Record upon appeal by defendant, Horace Randall Sistare; Opinion of the Supreme Court of Errors upon the appeal; Judgment of the Supreme Court of Errors thereon.

Witness my hand and the seal of the Supreme Court of Errors of the State of Connecticut, this 19th day of July, A. D. 1907.

[Seal Supreme Court of Errors, Conn.]

GEORGE E. PARSONS,
Clerk of the Supreme Court of Errors of the State of Connecticut for the Second Judicial District.

25 STATE OF CONNECTICUT, *County of New London:*

Superior Court, May Session, 1907, June 21st, 1907.

MATHILDE VON ELLERT SISTARE, of the Borough of Manhattan, City and State of New York,
vs.
HORACE RANDALL SISTARE, of the City of Newark, New Jersey.

Defendant's Judgment.

New London County Superior Court, February 19th, 1907.

MATHILDE VON ELLERT SISTARE, of the Borough of Manhattan, City and State of New York,
vs.
HORACE RANDALL SISTARE, of the City of Newark, State of New Jersey.

Judgment.

This action by complaint claiming ten thousand, (10,000.00) dollars damages, came to this Court on the first Tuesday of September, 1904, and thence by continuance to the present time, when the parties appeared and were at issue to the Court as on file.

The Court having heard the parties finds the issues for the plaintiff.

Whereupon it is adjudged that the plaintiff recover of the Defendant, five thousand eight hundred and five ($5805.00) dollars damages and her costs taxed at —— dollars —— cents.

By the Court:

JOHN C. AVERILL, *Clerk.*

From this judgment the Defendant appealed to the Supreme Court of Errors next to be holden at Norwich, within and for the Second Judicial District of Connecticut on the last Tuesday of April, 1907, which said appeal was allowed and said cause came to said Court at its term held at Norwich on the last Tuesday of April 1907, when the parties appeared and were fully heard.

26 And said Court having found that in the record judgment and proceedings of this Court there is error, it was thereupon considered and adjudged by said Supreme Court of Errors that the said judgment appealed from, be reversed and the cause remanded to

this Court for the rendition of judgment in favor of the Defendant, as by the mandate of said Supreme Court duly certified to this Court appears.

This Court having heard the parties, in obedience to the mandate of said Supreme Court of Errors, finds the issue in favor of the Defendant, said Horace Randall Sistare.

Whereupon it is adjudged that the Defendant, said Horace Randall Sistare recover of the Plaintiff, said Mathilde von Ellert Sistare, his costs taxed at — dollars — cents.

By the Court:

JOHN C. AVERILL, *Clerk.*

STATE OF CONNECTICUT, *County of New London, ss:*

NORWICH, *July 19th, A. D.* 1907.

I, George E. Parsons, Clerk of the Superior Court within and for said County, do hereby certify, that the within and foregoing is a true copy of the original Judgment in the within named cause, rendered in said Superior Court in accordance with the mandate of the Supreme Court of Errors of said State of Connecticut, as on file and of record appears.

In Testimony Whereof, I have hereunto set my hand, and affixed the Seal of said Court, the day and year next above written.

[SEAL.] GEORGE E. PARSONS, *Clerk.*

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States States of America to the Honorable the Judges of the Supreme Court of Errors of the State of Connecticut, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Errors of the State of Connecticut before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Mathilda Von Ellert Sistare, Plaintiff and Plaintiff in Error, and Horace Randal Sistare, Defendant and Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
28 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Mathilda Von Ellert Sistare as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of June, in the year of our Lord one thousand nine hundred and seven.

E. E. MARVIN,
Clerk of the Circuit Court of the United States,
for the District of Connecticut.

Allowed by
SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of
Errors of the State of Connecticut.

29 STATE OF CONNECTICUT, *New London County, ss:*

NORWICH, *June* —, 1907.

Then and there I served the within Writ of Error by lodging a copy thereof, for the adverse party, in the office of the clerk of the Supreme Court of Errors of the State of Connecticut, for the Second Judicial District, which is the clerk's office where the record remains, within sixty (60) days, Sunday exclusive, after the rendition of the judgment complained of.

Attest:

J. H. TUBBS,
Deputy Sheriff.

Sworn to before me this 28th day of June, A. D. 1907.

[Seal Benjamin H. Hewitt, Notary Public, Stonington, Conn.]

BENJAMIN H. HEWITT,
Notary Public.

STATE OF CONNECTICUT, *New London County, ss:*

NEW LONDON, *June 28th,* 1907.

Then and there I received a copy of the within Writ for the adverse party.

JOHN C. AVERILL.

Attest:

_____,
Clerk of the Supreme Court of Errors of the State
of Connecticut, for the Second Judicial District.

30 UNITED STATES OF AMERICA, *ss:*

To Horace Randall Sistare of the City of Newark, of the State of New Jersey:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error, filed in the clerk's office of the Supreme Court of Errors of the State of Connecticut, wherein Mathilde von Ellert Sistare is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Simeon E. Baldwin, Chief Justice of the Supreme Court of Errors of the State of Connecticut, this 26th day of June in the year of our Lord one thousand nine hundred and seven.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

On this 28th day of June in the year of our Lord, one thousand nine hundred and seven, personally appeared J. H. Tubbs, Deputy Sheriff, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Messrs. Brandegee, Noyes & Brennan, Counsel of Record for Horace Randall Sistare, the defendant in error.

Attest:

J. H. TUBBS,
Deputy Sheriff.

Sworn to and subscribed this 28th day of June, A. D. 1907.

JOHN C. AVERILL,
Justice of the Peace.

31 On this 28 day of June in the year of our Lord one thousand nine hundred and seven, personally appeared J. H. Tubbs, Deputy Sheriff before me, the subscriber, and makes oath that he delivered a true copy of the within citation for Horace Randall Sistare, the defendant in error, by leaving such copy with John C. Averill, the clerk of the Supreme Court of Errors of the State of Connecticut for the Second Judicial District, at the clerk's office, New London County, State of Connecticut.

Attest:

J. H. TUBBS,
Deputy Sheriff.

Sworn to and subscribed this 28th day of June, A. D. 1907.

JOHN C. AVERILL,
Justice of the Peace.

32 [Endorsed:] Original. Mathilde von Ellert Sistare *vs.* Horace Randall Sistare. Citation. Slade, Slade & Slade, Attorneys and Counsellors at Law, First National Bank Building, New Haven, Conn.

33 Supreme Court of Errors of the State of Connecticut.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Petition for Writ of Error.

To the Honorable Simeon E. Baldwin, Chief Justice of the Supreme Court of the State of Connecticut:

The petition of Mathilde von Ellert Sistare respectfully shows:

That, on the 5th day of June, 1907 a judgment was entered in your honorable court in favor of Horace Randall Sistare, defendant in said case and appellant in your honorable court, and the plaintiff, appellee and plaintiff in said court, wherein was drawn the application, effect, construction and protection of certain clauses in the constitution of the United States, and the decision was against the right, title, privilege and protection claimed under said clauses of the constitution.

Wherefore, the said Mathilde von Ellert Sistare, plaintiff in the above entitled case does hereby petition for a Writ of Error from the United States Supreme Court to the Supreme Court of Errors of the State of Connecticut, upon said judgment, for the reasons specified in the assignment of errors which is filed herewith.

Whereupon, said plaintiff prays for the allowance of a Writ of Error, and for an order fixing the amount of bond for supersedeas in said cause, and for such other orders and processes as may cause the same to be corrected by said United States Supreme Court.

Dated this 13th day of June, A. D., 1907.

MATHILDE VON ELLERT SISTARE,
By SLADE, SLADE & SLADE, *Her Att'ys.*

34 Writ of Error allowed upon execution of a bond with good and sufficient security in the sum of $500.00 that Mathilde von Ellert Sistare, plaintiff in error, for prosecuting her suit to effect and answer all damages and costs if she fail to make her plea good.

Dated at New Haven, this 26th day of June, A. D. 1907.

SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

35 (*Reasons of Appeal and Error.*)

The Supreme Court of the State of Connecticut, Second Judicial District.

MATHILDE VON ELLERT SISTARE
vs.
HORACE RANDALL SISTARE.

Now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Connecticut, in the above entitled matter, there is manifest error in this, to wit:

1. Because the court erred in reversing the judgment of the Superior Court and ordering the rendition of judgment in favor of the defendant and defendant in error.

2. Because the court erred in overruling the claim of the plaintiff in error that said judgment of the Superior Court was a valid judgment and not erroneous.

3. Because the court erred in holding, ruling and deciding that the judgment of the New York Supreme Court did not create a debt of record against the defendant in error.

4. Because the court erred in holding, ruling and deciding that the New York Supreme court judgment or decree was not such Record or Judicial proceeding as was within the purview of section 1, article fourth of the Constitution of the United States.

5. Because the court erred in holding, ruling and deciding that the New York Supreme Court's judgment or decree had no extra-territorial value or force.

6. Because the court erred in holding, ruling and deciding that the New York Supreme Court's judgment or decree was not conclusive in character and not a final judgment.

7. Because the court erred in holding, ruling and deciding that the plaintiff in error acquired no vested property rights to the accrued installments unpaid under the New York Supreme Court's judgment or decree.

8. Because the court erred in holding, ruling and deciding that the remedies under sections 1772 and 1773 of the New York Code of Civil Procedure are exclusive for the enforcement of the New York Supreme Court's judgment or decree in question.

9. Because the court erred in holding, ruling and deciding that no judgment can be entered in a state other than New York, upon the judgment or decree in question rendered in favor of the plaintiff in error by the New York Supreme Court.

10. Because the court erred in holding, ruling and deciding that the Courts of the State of Connecticut are under no constitutional obligation to give effect in the manner sought (here by the plaintiff in error) to enforce the judgment or decree of the New York Supreme Court.

11. Because the court erred in holding, ruling and deciding that the Supreme Court of Errors of the State of Connecticut ought not to enforce the New York Supreme Court's judgment or decree on the ground of Comity, because by so doing it would give such New York judgment or decree greater effect than would be given to it in the jurisdiction of its origin.

12. Because the court erred in failing to properly apply the doctrine governing the case at bar, as laid down by the Supreme Court of the United States in the case of Barber *vs.* Barber, 21 How., 582.

13. Because the court erred in holding, ruling and deciding that the New York Supreme Court's judgment or decree in question, could not be made the foundation for an action in the State of New York upon a debt of record for the accrued unpaid installments.

14. Because the court erred in holding, ruling and deciding that the New York Supreme Court retained discretionary control under

the New York Code of Civil Procedure in respect to unpaid
37 past installments, under the judgment or decree in question.

15. The court erred in holding, ruling and deciding that the New York Supreme Court's judgment or decree was not entitled to full faith and credit in this state, under the Constitution of the United States.

MATHILDE VON ELLERT SISTARE,
By SLADE, SLADE & SLADE, *Her Attorneys.*

38 (*Bond.*)

Know all men by these presents, That we, Mathilde von Ellert Sistare, as Principal, and The United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty Street, in the City of New York, as Surety are held and firmly bound unto Horace Randal Sistare in the full and just sum of Five hundred ($500.) dollars to be paid to the said Horace Randal Sistare certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of June, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a session of the Supreme Court of Errors of the State of Connecticut in a suit depending in said Court, between Mathilde Von Ellert Sistare and Horace Randall Sistare a judgment was rendered against the said Mathilde Von Ellert Sistare and the said Mathilde Von Sistare having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of the said Court to reverse the Judgment in the aforesaid suit, and a citation directed to the said Horace Randall Sistare citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Mathilde Von Ellert Sistare shall prosecute her Writ of Error to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

MATHILDE VON ELLERT SISTARE. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager. [SEAL.]

Attest:

GEORGE E. HAYES,
Attorney in Fact.

Sealed and delivered in presence of
ROBERT GOELLER.
J. D. BROCKWAY.

Approved by
SIMEON E. BALDWIN,
Chief Justice of the Supreme Court of Errors of the State of Connecticut.

39 STATE OF NEW YORK, *City and County of New York, ss:*

On this 21st day of June, 1907, before me personally appeared Mathilde Von Ellert Sistare to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

J. D. BROCKWAY,
Com. of Deeds, City of New York.

Affidavit, Acknowledgement and Justification by the United States Fidelity and Guaranty Company.

STATE OF NEW YORK, *County of New York, ss:*

Before me personally came Sylvester J. O'Sullivan known to me to be the Manager of The United States Filedity and Guaranty Company, the corporation described in and which executed the annexed bond of Mathilde von Ellert Sistare as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York State of New York and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Mathilde von Ellert Sistare is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney in fact of said Company; and that the signature of said George E. Hayes subscribed to said bond is the genuine handwriting of said
40 George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000).

SYLVESTER J. O'SULLIVAN.

[Corporate Seal of United States Fidelity and Guaranty Company.]

Sworn to, acknowledged before me, and subscribed in my presence this 21st day of June, 1907.

[NOTARIAL SEAL.]

DANIEL C. DEASY,
Notary Public, New York County.

41 STATE OF CONNECTICUT, *New London County:*

Second Judicial District, Norwich, July 19th, 1907.

In obedience to the commands of the within writ, I, George E. Parsons, Clerk of the Supreme Court of Errors of the State of Connecticut for the Second Judicial District, hereby make return to the foregoing writ of error, and herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same, together with the original writ of error, and affidavit of service thereof; the original citation and affidavit of service thereof, together with copies of the petition for writ of error, allowance thereof, assignments of errors and bond; and I hereby certify that the original writ of error, together with a copy thereof for Horace Randall Sistare (Defendant in error) and the original of said bond were lodged in my office on the 28th day of June, A. D., 1907.

Witness my hand and the seal of the Supreme Court of Errors of the State of Connecticut, the day and year first above written.

[Seal Supreme Court of Errors, Conn.]

GEORGE E. PARSONS,
Clerk of the Supreme Court of Errors of the State of Connecticut for the Second Judicial District.

Endorsed on cover: File No. 20,810. Connecticut supreme court of errors. Term No. 145. Mathilde von Ellert Sistare, plaintiff in error, *vs.* Horace Randall Sistare. Filed July 23d, 1907. File No. 20,810.

Supreme Court, U. S.
FILED
MAR 3 1909
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

OCTOBER TERM, 1908.

No. [redacted]7

MATHILDA VON ELLERT SISTARE,

PLAINTIFF IN ERROR

vs.

HORACE RANDALL SISTARE,

DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN SLADE,
ROBERT GOELLER,
Counsel for the Plaintiff in Error.

S. Z. FIELD, LAW PRINTER, NEW HAVEN.

Supreme Court of the United States

OCTOBER TERM, 1908.

No. 145.

MATHILDA VON ELLERT SISTARE,
PLAINTIFF IN ERROR

vs.

HORACE RANDALL SISTARE,
DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is an action founded upon a judgment or decree of separation rendered by a special term of the Supreme Court of the State of New York on the 22nd day of July, 1899, in favor of the plaintiff in error against the defendant in error to recover the amounts past due and which have accrued between the date of the rendition of said judgment or decree and the date of the bringing of this action.

By the New York decree, which is made a part of the complaint, it appears that the court that granted said decree had jurisdiction over the defendant in error at the time of

its rendition. The record further discloses that the courts of Connecticut at the time the present action was instituted had jurisdiction over the defendant.

The amount of alimony accrued under the decree in question aggregates five thousand eight hundred and five ($5,805) dollars, for which sum the Superior Court for New London County in the State of Connecticut rendered a judgment for the plaintiff in error against the defendant in error, and upon appeal to the Supreme Court of Errors of said State of Connecticut (it being the court of last resort in said State), said judgment was reversed, and in pursuance to the opinion and mandate of said Supreme Court of Errors final judgment was rendered in favor of the defendant in error and against the plaintiff in error.

SPECIFICATION OF ERRORS.

It is claimed that error in this case has been committed by the Supreme Court of Errors of the State of Connecticut in the following particulars, as set forth on pages 22 and 23 of the Record.

1. The court erred in reversing the judgment of the Superior Court and in ordering the rendition of judgment in favor of the defendant.

2. The court erred in overruling the claim of the plaintiff that said judgment of the Superior Court was a valid judgment.

3. The court erred in holding, ruling and deciding that the judgment of the New York Supreme Court did not create a debt of record against the defendant.

4. The court erred in holding that the New York Supreme Court judgment or decree was not such Record or

Judicial proceeding as was within the purview of Section 1, Article IV of the Constitution of the United States.

5. The court erred in ruling that the New York Supreme Court's judgment or decree had no extra-territorial value or force.

6. The court erred in holding that the New York Supreme Court's judgment or decree was not conclusive in character and not a final judgment.

7. The court erred in ruling that the plaintiff in error acquired no vested property rights to the accrued installments unpaid under the New York Supreme Court's judgment or decree.

8. The court erred in ruling that the remedies under Sections 1772 and 1773 of the New York Code of Civil Procedure are exclusive for the enforcement of the New York Supreme Court's judgment or decree.

9. The court erred in ruling that no judgment can be entered in a State other than New York upon the judgment or decree in question.

10. The court erred in holding that the courts of the State of Connecticut are under no constitutional obligation to give effect, in the manner sought, to the enforcement of the New York judgment or decree.

11. The court erred in ruling that the Supreme Court of Errors of the State of Connecticut ought not to enforce the New York judgment on the ground of comity, because by so doing it would give such New York judgment greater effect than would be given to it in the jurisdiction of its origin.

12. The court erred in failing to properly apply the doctrine laid down by the Supreme Court of the United States in the case of Barber v. Barber, 21 How., 582.

13. The court erred in ruling that the New York judgment or decree in question could not be made the foundation for an action in this State as upon a debt of record for the accrued unpaid installments.

14. The court erred in ruling that the New York Supreme Court retained discretionary control under the New York Code in respect to unpaid past installments.

15. The court erred in ruling that the New York judgment or decree in question was not entitled to full faith and credit in this State, under the Constitution of the United States.

ARGUMENTS AND CLAIMS.

CLAIM I.

The provision of the Constitution that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Acts of Congress providing for the mode of authenticating the records and judicial proceedings of the State courts, declares that "the records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence said records are or shall be taken."

It seems that under this provision and Acts of Congress the only inquiry to be made by the court wherein the judicial proceedings is sought to be enforced is "What faith and credit is given to such judicial proceedings by the court that rendered it?"

It cannot be seriously disputed that if the judgment in question was sought to be enforced in the State of New

York the defendant's present claim of non-finality would be inoperative. It is perhaps true that the judgment in question could only be enforced in the State of New York by the special methods prescribed by the Code, which are in the nature of execution. That in itself, in our opinion, does not destroy the effectiveness of the New York judgment until it is actually reversed, changed or modified by proper judicial proceedings in the manner prescribed by said New York Code.

The reasoning of the learned Supreme Court of Errors of the State of Connecticut seems to necessarily imply a change of the constitutional provision relating to "full faith and credit." The conclusions reached by the learned Court in the case at bar requires that the constitutional provision should be construed to read that "full faith and credit shall be given in each State to the public acts, records, and *final* or *unreversible* judicial proceedings of every other State."

The framers of the Constitution evidently for a good reason, as demonstrated by the facts in this case, saw fit to eliminate the term "final or unreversible" from the provision as drawn. It would seem unwise to change the constitutional provisions by judicial construction.

From the authoritative expressions of this court we understand the rule to be that whenever a court of any State having jurisdiction of the parties and subject-matter passes any judgment or decree, that such judgment or decree is a judicial proceeding within the meaning of the Constitution and is of full binding force and effect as against the parties to such proceeding or their privies. If that rule is applied to the case at bar the validity of the judgment against the defendant in all its aspects cannot be destroyed.

Bouvier's Dictionary, Vol. 1, defines "judicial proceedings" as follows:

"Proceedings relating to, practiced in, or proceeding from, a court of justice."

The judgment rendered by the New York Supreme Court in the case at bar certainly related to a court proceeding and emanated from a court of justice.

An inspection of the Record (page 2) discloses that the decree of the Court of New York contains the following provisions:

"Ordered, adjudged and decreed that the plaintiff be, and she hereby is *forever* separated from the defendant, and from the bed and board of the said defendant, on the ground of non-support and cruel and inhuman treatment by the defendant. And it is

"Further ordered, adjudged and decreed that from and after the entry of this decree, the defendant, Horace Randall Sistare, pay to the plaintiff, Mathilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty two and 50/100 dollars ($22.50) per week, such sum to be paid into the hands of her attorneys of record in this action, on each and every Monday. * * * And it is further

"Ordered, adjudged and decreed that the costs are hereby awarded to the plaintiff against the defendant, taxed at the sum of one hundred and seventeen and 67/100 dollars ($117.67) and that the plaintiff do recover said costs from the defendant and have execution therefor."

From the language employed in said decree it is quite clear that the plaintiff IS FOREVER SEPARATED FROM THE DEFENDANT, and that the defendant's obligation to contribute to the support of the

plaintiff and the maintenance and education of the plaintiff's and defendant's child to the extent indicated by the decree commenced with the date of the entry of the final decree of separation; the language of the decree upon that subject being:

"Further ordered, adjudged and decreed that *from and after the entry of this decree,* the defendant, Horace Randall Sistare, pay to the plaintiff, Mathilda Von Ellert Sistare, for her maintenance and support and the maintenance and education of Horace Von Ellert Sistare, the minor child of the plaintiff and defendant, the sum of twenty-two and 50/100 dollars ($22.50) per week, such sum to be paid into the hands of her attorneys of record in this action, on each and every Monday."

The decree in question finds its support under certain sections of the New York Code of Civil Procedure, which are as follows:

"Sec. 1769. ALIMONY, EXPENSES OF ACTION, AND COSTS; HOW AWARDED. Where an action is brought, as prescribed in either of the last two articles, the court may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money, necessary to enable the wife to carry on or to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs, in favor of or against either party, and an execution may issue for the collection thereof, as in an ordinary case; or the court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court."

"Sec. 1771. CUSTODY AND MAINTENANCE OF CHILDREN, AND SUPPORT OF PLAINTIFF. Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in final judgment, or by one or more orders, made from time to time, before final judgment, such directions, as justice requires, between the parties, for the custody, care, education and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions, but no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained."

The learned Court below, in view of the language found in Section 1771 of the Code hereinbefore quoted, held that the decree in question being subject to a modification was not a final judgment entitled to the protection under the Constitution of the United States. This court, therefore, is now called upon to determine the federal question involved.

The case of

Barber v. Barber, 21 How., 582,

decided by the Supreme Court of the United States in 1859, as we view it, is decisive of this case upon that proposition. That was a case arising under a suit in equity in the District Court of the United States for the District of Wisconsin,

wherein by a decree the plaintiff in the suit was awarded a judgment of several thousand dollars on a decree of divorce from bed and board given by the State courts of New York, and in addition thereto said decree awarded to the plaintiff the annual sum of $360, payable each and every year in quarterly installments.

The plaintiff sought to recover the alimony retrospectively due between the date of filing of the petition and the final decree. The complaint charged the defendant with having failed to pay any part of the alimony adjudged to the plaintiff. The defendant demurred upon the grounds:

First: Because the case was not within the ordinary jurisdiction of the Court of Chancery;

Second: That the relief sought could only be had in the Court of Chancery of New York (which court granted the decree):

Third: That it did not appear that the plaintiff had exhausted the remedy which she had in New York.

The demurrer was overruled, and thereafter the defendant filed his answer, in which, among other things, he alleged that he obtained a divorce from his wife in the State of Wisconsin in 1852. Upon these pleadings the case was determined, and the plaintiff recovered a judgment for alimony and interest which accrued prior to the time of the bringing of the action.

The court in its opinion, on page 582, says:

"It also appears, from the record, that the defendant had made his application to the court in Wisconsin for a divorce a vinculo from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York; and that, contrary to the truth, verified by that

record, he asks for the divorce on account of his wife having wilfully abandoned him. It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber. IT CERTAINLY HAS NO EFFECT TO RELEASE THE DEFENDANT THERE AND EVERYWHERE ELSE FROM HIS LIABILITY TO THE DECREE MADE AGAINST HIM IN THE STATE OF NEW YORK, UPON THAT DECREE BEING CARRIED INTO JUDGMENT IN A COURT OF ANOTHER STATE OF THIS UNION, OR IN A COURT OF THE UNITED STATES, where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him. * * *

The parties to a cause for a *divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the Ecclesiastical Court of England.* The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, WILL BE CARRIED INTO JUDGMENT IN ANY OTHER STATE, TO HAVE THERE THE SAME BINDING FORCE THAT IT HAS IN THE STATE IN WHICH IT WAS ORIGINALLY GIVEN. FOR SUCH A PURPOSE, BOTH THE EQUITY COURTS OF THE UNITED STATES AND THE SAME COURTS OF THE STATE HAVE JURISDICTION. * * *

The general rule is, that a voluntary separation will not give to the wife a different domicilation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of these conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries or the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he

yields up that power and authority over her which alone makes his domicile hers, and places her in a situation to sue him for a divorce *a mensa et thoro*, and to ask the court having jurisdiction of her suit to allow her from her husband's means, by way of alimony, a suitable maintenance and support. When that has been done, IT BECOMES A JUDICIAL DEBT OF RECORD AGAINST THE HUSBAND, WHICH MAY BE ENFORCED BY EXECUTION OR ATTACHMENT AGAINST HIS PERSON, ISSUING FROM THE COURT WHICH GAVE THE DECREE; and when that cannot be done on account of the husband having left or fled from that jurisdiction to another, where the process of that court cannot reach him, the wife, by her next friend, may sue him, wherever he may be found or where he shall have acquired a new domicile, for the purpose of recovering the alimony due to her, or to carry the decree into a judgment there with the same effect that it has in the State in which the decree was given. ALIMONY DECREED TO A WIFE IN A DIVORCE OF SEPARATION FROM BED AND BOARD, IS AS MUCH A DEBT OF RECORD, UNTIL THE DECREE HAS BEEN RECALLED, AS ANY OTHER JUDGMENT FOR MONEY IS. * * * "

See also,

Howard v. Howard, 15 Mass., 196.
Clark v. Clark, 6 Watts & Serg., 85.
Wheeler v. Wheeler, 2 Dana, 310.
Knapp v. Knapp, 59 Fred. Rep., 641.
Trowbridge v. Spinning, 54 L. R. A., 204.
Arrington v. Arrington, 127 N. C., 190.

The learned Court below indicates that its conclusions in the case at bar were based on Lynde v. Lynde, 181 U. S., 187, and by its opinion (Record, pages 12, 13, 14 and 15) undertakes to distinguish that case from the case of Barber v. Barber, supra, by saying that under the law of New York, as it existed when the decree in the Barber case was granted,

the New York courts had no authority to modify such decree directing the payment of alimony or an allowance for future maintenance. That precise proposition was undoubtedly considered by the Supreme Court of the United States in the Barber case.

In the dissenting opinion by Justice Daniel, 21 How., 582, he says:

"The second error in the position before mentioned is shown by the character and objects of the allowance made as alimony to a wife. This allowance is not in the nature of an absolute debt. IT IS NOT UNCONDITIONAL, BUT ALWAYS DEPENDENT UPON THE PERSONAL MERITS AND CONDUCT OF THE WIFE—MERITS AND CONDUCT WHICH MUST CONTINUE, IN ORDER TO CONSTITUTE A VALID CLAIM TO SUCH AN ALLOWANCE. THIS ALLOWANCE MIGHT UNQUESTIONABLY BE FORFEITED, UPON PROOF OF CRIMINALITY OR MISCONDUCT OF THE WIFE, WHO WOULD NOT BE PERMITTED TO ENFORCE THE PAYMENT OF THAT TO WHICH IT SHOULD BE SHOWN SHE HAD LOST ALL JUST CLAIM; AND THIS INHIBITION, IT IS PRESUMED, MIGHT EMBRACE AS WELL A PORTION OF THAT ALLOWANCE AT ANY TIME IN ARREARS, AS ITS DEMAND IN THE FUTURE. The essential character, then, of this allowance, viz: its being always conditional and dependent, both for its origin and continuation, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances."

It is said in the opinion of the majority of the court, 21 How., 582, that:

"Alimony decreed to a wife in a divorce for separation from bed and board is as much a debt of record, UNTIL THE DECREE HAS BEEN RECALLED, as any other judgment for money is."

From these quotations it would seem that the Supreme Court of the United States undoubtedly understood very distinctly while considering the Barber case that under the New York law as it then stood the allowance might be forfeited, and the decree in that respect annulled or recalled, for the subsequent misconduct of the wife.

In the case of Lynde v. Lynde, supra, this learned court affirmed the ruling made by the Court of Appeals of New York restricting the plaintiff's recovery to $8,840, which was the fixed sum adjudged at one stage during separation proceedings before the Court of Chancery of New Jersey, and disregarded the provisions of a separation decree directing the payment of alimony in the future.

It seems to us to be important to note that in the Lynde case the facts were as follows: On the 18th of November, 1892, the plaintiff filed her bill for divorce in the Chancery Courts of New Jersey praying a divorce from the bond of matrimony and for reasonable alimony. The defendant was not served with process other than by publication, and did not appear or answer the bill. On the 7th of August, 1893, a decree of divorce was entered not mentioning alimony. In 1896 the plaintiff alleged that the decree, through the neglect of her counsel, was incomplete, and filed a petition praying for an allowance of alimony. Under that petition a rule to show cause was entered and served upon the defendant, and thereafter the defendant appeared generally, thereby submitting himself to the jurisdiction of the court.

Under that petition an order of reference to a master was made to find the amount of alimony, if any, due to the plaintiff, and on the 28th day of December, 1897, passed a decree that the plaintiff was entitled to recover of the defendant $7,840 alimony at the rate of $80 per week from

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Under that petition an order of reference to a master was made to find the amount of alimony, if any, due to the plaintiff, and on the 28th day of December, 1897, passed a decree that the plaintiff was entitled to recover of the defendant $7,840 alimony at the rate of $80 per week from

February, 1896, to the date of the decree, and a further sum of $80 per week permanent alimony from the date of the decree, the costs of the proceedings and $1,000 counsel fees.

Upon these facts we believe that this learned Court took into consideration the fact that the New Jersey Court's jurisdiction over the defendant in the Lynde case was limited to the proceedings on the petition brought by the plaintiff in February, 1896, in which the defendant appeared generally, and for that reason the defendant's liability was restricted to the alimony as found to be due under that petition.

The provision for the future payment of alimony in the Lynde case could only be supported by the decree of divorce passed in August, 1893, and at a time when the court passing said decree had no jurisdiction over the defendant.

A reference to opinion of the New York Court of Appeals in Lynde v. Lynde, 162 N. Y., 412, will disclose that the want of jurisdiction was considered a vital point on the question of sustaining the validity of the decree effecting future payments.

On page 412 the court says:

"With respect to the main question, whether the Court of Chancery of the State of New Jersey acquired jurisdiction over the defendant to render the final decree for the payment of alimony, it is argued, in his behalf, that the decree of divorce is invalid as to him, and, therefore, afforded no support for the decree of alimony. *That the decree of divorce was of no force as to him cannot be disputed.* * * * The decree of divorce which the plaintiff obtained in New Jersey was effectual to determine her status as a citizen of that State towards the defendant; but as to him it effected nothing and was void for want of personal service of process, or of an appearance by him in the divorce proceedings. * * * As the service of process was constructive, by pub-

lication, however authorized by the laws of the State, it was ineffectual against the defendant for any purpose. This action, however, is upon a final decree of the Chancery Court of New Jersey, which rendered a money judgment in *personam* against the defendant in *a proceedings* in which there was a voluntary appearance on his part."

The court then, on page 413, treats the question of the defendant having submitted to the jurisdiction of the court and has thereby waived the right to question the invalidity of the original decree, and says on page 414:

"In my opinion, assuming, as we must, that the decree of the Chancery Court, which amended the original decree of divorce, expressed the law of the State of New Jersey, jurisdiction was obtained over the defendant by his appearance, plea and submission, to so far cure the invalidity of the divorce decree as to render it *effective as a basis for alimony proceedings*. But whether its invalidity was cured, or not, in the subsequent proceedings to which the defendant was a party, a final decree was entered adjudging that he pay to the plaintiff a certain sum of money. The jurisdiction once obtained could not be divested by his refusal to appear in the later stages of the proceeding. He cannot now attack the final decree of the court collaterally, after having had his day in court."

The distinction that exists between the case of Lynde v. Lynde and Barber v. Barber is that in the former case so much of the decree providing for the future payment of alimony was invalid as against the defendant for want of jurisdiction; but in the Barber case the decree having been rendered with jurisdiction over the defendant, such decree was sustained in its entirety.

If that distinction is well founded, both opinions are in accord; if no such distinction exists, the decision in the

Lynde case seems inconsistent with the doctrine laid down in the Barber case.

CLAIM II.

THE LEARNED COURT OF CONNECTICUT ERRED IN ITS CONSTRUCTION OF SECTION 1771 OF THE CODE OF CIVIL PROCEDURE OF NEW YORK, IN HOLDING THAT UNDER THAT SECTION THE TRIAL COURT HAS POWER TO ANNUL, VARY OR MODIFY ITS DECREE EFFECTING THE QUESTION OF ALIMONY.

We believe that Section 1771 of the New York Code should be so construed as to limit the court's power to annul, vary or modify any *direction* that it may have made relating to the custody, care, education and maintenance of any children of the marriage.

If our construction is correct, that statute, by reasonable implication, prohibits the court, after final judgment, from annulling, varying or modifying any part of the decree effecting the question of alimony.

The section in question is mandatory on the point that, "The court *must*, except as otherwise expressly provided in those articles, give, either in final judgment, or by one or more orders made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff."

The section then provides as follows: "The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make

the same shall have been previously granted by the court by order made upon or without notice, as the court in its discretion may deem proper, after presentation to the court of satisfactory proof that justice requires that such an application shall be entertained."

In view of the language found in the latter part of Section 1771, prescribing that no such application shall be made by the "defendant unless leave to make it was previously granted by the court and only after presentation to the court of satisfactory proof that justice requires that such an application shall be entertained," it is quite clear that the law-making powers of New York contemplated that such an application can only be entertained upon the presentation of new facts occurring after the rendition of the original decree effecting the care, custody and maintenance of the children. Under the doctrine of public policy the State, through its courts, has reserved to itself jurisdiction on questions effecting the future welfare of the children.

If this reasoning is sound, it follows that, unless new facts occur, there can be no alteration of such decree even effecting the care, custody and maintenance of children. If, for the sake of argument, it is assumed that under the provision of the code in question the trial court's powers are broad enough to embrace the question of alimony, we still claim that such power does not destroy the finality of the decree until that power is exercised.

The case of Dow v. Blake, Adm., 148 Ill., 76, we believe, supports the proposition that the court's power to modify a decree in respect to alimony, does not destroy its finality.

An ordinary judgment might be discharged or modified by new facts arising after its rendition, but that possibility does not effect the finality of that judgment in the first

instance. So in the case at bar (if this court is of the opinion that under the provisions of the code in question the court retains power to modify the decree respecting alimony) facts might occur after the decree which would authorize the court to recall the decree in that respect. The code provides special proceedings to bring these facts to the attention of the court, and such proceedings are in the nature of a new action.

That part of the code now under discussion, therefore, merely expressly states a similar rule of law governing decrees in divorce cases as now exist governing other judgments. For instance: a judgment at law might be revoked upon newly-discovered evidence, fraud, etc., but no one could successfully maintain that because of the existence of such power in the court that rendered said judgment, that until it is so revoked its finality is destroyed.

The learned Supreme Court of Connecticut in its opinion (Record, page 15) says in substance that the decree in question is inconclusive in its character by reason of the reservation in the court that made it of the unrestricted right to change or annul it, and which is enforceable in the State of its origin only by the process indicated by the code, that such decree does not create a debt of record entitled to extra-territorial recognition.

If that is the law a most extraordinary and an extremely unfortunate situation is created; for all a defendant would have to do in a case of this character would be to remove from the jurisdiction of the court that rendered the decree, probably taking with him all his property, and when pursued to another jurisdiction advance the claim made by the defendant in the case at bar and thereby prevent the payment of the judgment, no matter how able to respond he may be.

It does seem that if another sound legal conclusion can be reached avoiding such result, it should be done. More accurate justice would be accomplished to hold that should any modification be made of the decree by the court of its rendition, the courts of the State wherein it is sought to enforce it, by proper proceedings instituted there, give effect to such modification, thereby carrying out the requirements of the Federal Constitution.

If such modification was made by the court that rendered the decree in question before the present suit was instituted in Connecticut, of course such modification could be pleaded by way of defense. In the absence of a modification, the courts of Connecticut should be required to give to that decree the same binding force and effect that it has in the State of New York.

Barber v. Barber, supra.
Kunze v. Kunze, 94 Wis., 54.
Trowbridge v. Spinning, 54 L. R. A., 204.
Dobson v. Pierce, 12 N. Y., 156.
Fletcher v. Farrel, 9 Dana, 372.
Cheever v. Wilson, 9 Wall. 108.
Shield v. Thomas, 18 How., 353.
Younge v. Carter, 10 Hun., 194.

In the recent case of

Harris v. Balk, 198 U. S., 214,

it is said that: "The judgment of a State court, if that court had jurisdiction to render it, is entitled to the same full faith and credit in the courts of another State that it has in the State where rendered, as a valid domestic judgment."

The learned Court of Connecticut in its opinion (Record,

page 12) quotes the following from the case of Lynde v. Lynde, supra:

"The decree for the payment of $7,840 was for a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey which it might at any time alter and was not a final judgment for a fixed sum."

If the construction of Section 1771 of the New York Code made by the learned Supreme Court of Errors is applicable to the New Jersey statute under which the decree in the Lynde case was rendered, in view of the similarity between the provision of the Code and the New Jersey statute, it follows under that construction the entire decree in both cases is inconclusive in character by reason of the reservation to the court which made it of the unrestricted right to change or annul it at their discretion. A decree for a fixed sum of money, as in the Lynde case, is as much subject to annulment or reversal as a decree for the future payment of alimony.

Under the construction given by the court below to these statutes, no distinction can be made between the sum decreed as payable at once, and any sum decreed payable in the future. The statutes in question contain no language differentiating between the sums adjudged at the rendition of the decree and the sums adjudged to become payable in the future.

Yet a part of the decree in the Lynde v. Lynde case was enforced.

CLAIM III.

THE DECREE IN QUESTION, UNTIL REVERSED, ANNULLED OR MODIFIED, IS A VALID SUBSISTING OBLIGATION ON THE PART OF THE DEFENDANT AND IS DEFINITE IN ITS CHARACTER.

In

Knapp v. Knapp, 59 Fed. Rep., 641,

the court held that an action at law will lie in a federal court upon a decree of divorce rendered by a State court of equity to recover the alimony accrued at the time of the filing of the complaint.

That was an action at law for a debt and was based on a decree of the Superior Court of the State of Washington, which, among other things, provided that the defendant should pay the plaintiff in monthly installments, payable on the first of each month, the sum of $10 for her support and the support and maintenance of the child. To that complaint the defendant demurred upon the grounds:

First: That the court had no jurisdiction of the person or subject-matter of the action.

Second: That the complaint does not state facts sufficient to constitute a cause of action.

The court in its opinion, on page 642, says:

"The only question, then, which could be raised by this demurrer, and the only question presented in arguing it, is as to whether or not a complaint in an action at law for a debt, based upon a decree of a Court of Chancery in a State court of general jurisdiction for a specific amount of money, states a cause of action in a federal court in another State or Territory.

Upon first approaching this question, I was somewhat surprised to find that Mr. Bishop, in his very learned work,

'Bishop on Marriage and Divorce,' in treating of it, says: 'The doctrine is believed to be general, that an action at law will not lie for money decreed in a Court of Equity.' 2 Bish. Mar. & Div., 499. But the case of Hugh v. Higgs, 8 Wheat., 697, to which he refers as authority, has been overruled in Pennington v. Gibson, 16 How., 65, where it is expressly held that in all cases where an action of debt can be maintained upon a judgment at law, to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount and the records of the court are of equal dignity and binding obligation. The other cases cited are from the courts of Massachusetts, and I have not been able to examine them; but under the clear statement of the law on the subject in Pennington v. Gibson, which is re-affirmed in Nations v. Johnson, 24 How., 203, I consider the question settled in the federal courts." See also

McCracken v. Swartz, 5 Oregon, 63.
Dubois v. Dubois, 6 Cowen, 494.
Allen v. Allen, 100 Mass. 374.
Horsford v. Van Ankes, 79 Ind., 302.

It seems to us that the same general rule of law should apply to the decree in question that would apply to an instrument in writing for the payment of money that will become due in installments, except that the decree in question has greater dignity and must be given more faith and credit than a mere written obligation can possibly have.

Brislowe v. Dobson, 50 Mo. Ap., 176.

We understand the rule to be that an action of debt will lie on a judgment as soon as it is recovered. In the majority of the States of this Union the owner of a judgment may bring suit thereon in the same court that rendered it or in

any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment may still have been enforced by execution in the State of its rendition.

Freeman on Judgments, Sec. 432, and authorities cited therein.

In Mills v. Duryea, 7 Cranch., 481, decided by the Supreme Court of the United States in 1813, it is said that the judgment of a sister State is conclusive on the merits for the purpose of pleading and evidence, and is entitled to the full dignity of a record, and that the defendant cannot, when sued on a judgment, deny the notice which it recites, or the obligation which it establishes, or impeach its justice.

In the case of Blake v. People, 80 Ill., 14, the court says that it is not perceived in what respect decrees for alimony differ from any other decrees for the payment of money, and that an action to recover upon such decree may be instituted by the wife to recover the amount due at the time of the suit.

Again, in Coughlin v. Ehlert, 39 Mo., 287, it is said:

"An order for the payment of alimony is simply an order for the payment of money."

That being so, the irresistible conclusion that follows is that in order to recover the payment of such money an ordinary civil action is all that is necessary to enforce the payment of the amount of money due at the time of the institution of the action.

Barber v. Barber, Supra.
Brislowe v. Dobson, Supra.

The case of Bullock v. Bullock, 57 N. J. L., 508, decided

in 1894, in our opinion seems to be quite instructive upon the proposition now under discussion. That was an action at law to recover $1,600 upon a decree rendered by the courts of New York directing the defendant to pay to the plaintiff alimony at the rate of $100 per month. The declaration alleged that there was due upon that decree $1,600 which remained unpaid. To the declaration the defendant demurred generally.

The court in its opinion says:

"The question as to the conclusive effect of the decree is no longer open in this State. In the recent case of Bullock v. Bullock, 7 Dick. Ch. Rep., 561, the Court of Errors and Appeals, while refusing to establish a decree for alimony made in New York as a lien upon land in New Jersey, declared "That the decree in New York conclusively determined the status of the parties to that action, and that the marital relations previously existing between them had been absolutely dissolved.

"If, by the direction to pay alimony an indebtedness arises from time to time, as such payments become due, an action at law will lie thereon, and the decree will furnish conclusive evidence of such indebtedness."

In Bennett v. Bennett, 3 Federal Cases, 1318, the facts were as follows:

The plaintiff instituted habeas corpus proceedings to recover a child awarded to her under a decree of divorce rendered by the courts of California. The statutes of California at that time provided that the court "may at any time thereafter annul, vary or modify such order as the interests and welfare of the children may require."

The defendant, among other claims, contended that the

order of the California court on the subject of the custody of the children being open to review, was likewise open to review in the present proceedings.

The court, in its opinion by Judge Deady, on page 214, says:

"The decree of divorce necessarily terminates the conjugal relations of the parties. * * * In such cases justice may require that when the divorce is caused by the fault or misconduct of the father * * * the custody of the children be given to the innocent party. But this is not all. The statute of California also declares that the court 'may at any time thereafter annul, vary or modify such order, as the interest and welfare of the children may require.'

" * * * Under the circumstances, the court was authorized to make such an order for the maintenance and education of this child as to it might appear just as between the parties, and at the same time calculated to promote its interest and welfare. That the court in the exercise of this power and for these ends, had authority to give the custody of the child to the mother, as a means of providing for its maintenance and education, in a way conducive to its interests and welfare, it seems to me there can be no doubt. This question was argued by counsel for respondent, upon the assumption that the judgment of the California court was open to review here, and that if it appeared that such court had misconstructed the statute from which it derived its authority, its action should be disregarded as null and void. But I am satisfied the law is otherwise. The court had jurisdiction of the parties and the cause. The cause was the controversy between the parents concerning the divorce and the future maintenance and education of the children of the marriage. Admitting, for the purpose of argument, that the court erred, either as to the fact or the law, in giving the custody of the child to the mother, as a means of providing for its maintenance and education, yet

that error can only be corrected by appeal to the proper court of review of California. BUT COLLATERALLY, THE LEGALITY OF THE JUDGMENT CANNOT BE QUESTIONED HERE OR ELSEWHERE. IT IS CONCLUSIVE UPON THE PARTIES TO IT, THROUGHOUT THE UNITED STATES, UNTIL REVERSED OR MODIFIED BY THE PROPER COURT IN THE JURISDICTION WHERE IT WAS GIVEN."

Under these authorities we feel at liberty to claim that the defendant in error in the case at bar is precluded from attacking the dignity and effect of the judgment in question until it has been actually reversed or set aside; and the ruling made by the Supreme Court of Errors of Connecticut on that point is erroneous.

CLAIM IV.

THE LEARNED COURT BELOW ERRED IN HOLDING THAT THE COURTS OF CONNECTICUT BY RENDERING A MONEY JUDGMENT IN THE CASE AT BAR WOULD BE GIVING GREATER EFFECT TO THE DECREE IN QUESTION THAN SUCH DECREE HAS IN THE STATE OF NEW YORK.

The court's conclusion, as expressed in the headlines under this claim, is based upon some decisions of New York holding that the provisions of a decree of separation under the Code of New York can only be enforced by the methods indicated by said Code, namely, a bond, sequestration proceedings, receiver, or punishment for contempt. All of said proceedings are in the nature of execution and do not effect the validity of the judgment.

We believe that it will be conceded that the decree in question is in full force and effect in New York, and if the New York courts acquired jurisdiction over the defendant or his property in a proceeding against him to enforce such

decree, his present claim of non-finality of that decree would not be effective.

The decree of divorce, valid and effectual by the law of the State in which it is obtained, is valid and effectual in all other States.

Cheever v. Wilson, 76 U. S., 108.

The enforcement of the decree in question in the State of Connecticut by rendering a judgment thereon and enforcing such judgment by execution, does not add any new life to the original decree, but merely changes the method or remedy of enforcing it.

In all cases a judgment of one State does not carry the efficacy of a judgment in another State capable of enforcement by execution until such judgment is reduced to a new judgment in the place where it is sought to enforce it. After obtaining a judgment in the place of enforcement it can only be executed in the latter State as its laws may permit.

Buchanan County Bank v. Hull County, 74 Fed., 373.
Lamberton v. Grant, 94 Me., 508.
Carter v. Bennett, 6 Fla., 214.
Thompson v. Wattman, 18 Wall., 457, 463.
Wisconsin v. Pelican Ins. Co., 127 U. S., 265, 292.
Banlock v. Banlock, 51 N. J. Eq., 444.

The doctrine of the New York courts in restricting the remedies for the enforcement of a decree of separation to the provisions of the Code is supported by, as we believe, the old theory that a court of law will refuse to take cognizance of actions on an equity decree, for the reason that the court which made the decree can within its own jurisdiction enforce it, and for that reason an action at law is unnecessary.

That theory of course cannot apply to the enforcement of a decree from a court of equity in a State other than its rendition.

It is undoubtedly true that, owing to the peculiar character of equity jurisprudence, there may be instances of decrees by courts of equity which can be enforced only by the authority and proceedings of those courts, such, for example, is the class of cases for specific performance; or wherever the decision of the court is to be fulfilled by some personal act of the party, and not by the mere payment of an ascertained sum of money or a sum which can be so ascertained. That result, of course, can only arise from the nature of the act decreed to be performed and from the peculiar or extraordinary power of the court to enforce it, and has no relation whatsoever to the comparative dignity or authority between judgments at law and decrees in equity.

From all the authorities upon this proposition, we feel of the opinion that the general rule is that in each instance in which an action of debt could be maintained upon a judgment at law for a sum of money awarded, a like action will lie upon a decree in equity for the sum due thereunder; and that the record of the proceedings in a case in equity is of the same dignity and binding force as that of a judgment at law.

A judgment recovered in one State is not executory in any other State in the sense that final process for its enforcement could issue on merely filing or docketing the judgment, as in the case of a domestic judgment.

Carter v. Bennett, 6 Fla., 214.
Leathe v. Thomas, 109 Ill. Ap., 434.
Dunham v. Dunham, 57 Ill. Ap., 475.
Joice v. Scales, 18 Ga., 725.

The constitutional provision for giving "full faith and credit" to such judgments, as we understand it, relates only to their effect as evidence or a bar to further litigation.

Claflin v. McDermot, 12 Fed., 375.
Chicago, etc., R. Co. v. Wiggins Ferry Co., 108 U. S., 18.

In Wood v. Wood, 28 N. Y. Supp., 154, it is held that in an action on a foreign judgment awarding alimony to the plaintiff, no other relief can be had than a recovery for past due alimony.

A bill in equity by a woman against her former husband to enforce a provision of a foreign decree of divorce awarding her a definite and ascertained sum as alimony, is demurrable on the ground that she has an adequate remedy at law by an action of debt on the decree.

Davis v. Davis, 9 L. R. A., 1071.

By carrying the decree in question into judgment in the State of Connecticut so that it would produce the same effect that it had in the State of New York, it is not claimed by us that it could be enforced in the latter State by the particular remedies provided for it in the New York Code. It is very evident that the only remedy the plaintiff seeks is to obtain the money claimed to be due under said decree, and it is hardly of any importance whether that money is procured by sequestration proceedings, injunction, receivership or contempt proceedings, as provided for by the New York Code, or under an execution issued under the laws of the State of Connecticut.

CLAIM V.

THE PLAINTIFF UNDER THE DECREE IN QUESTION ACQUIRED A VESTED PROPERTY RIGHT OF WHICH SHE COULD NOT BE DEPRIVED WITHOUT DUE PROCESS OF LAW.

The allowance in the decree to alimony created a judicial debt of record and formed a proper foundation for the recovery of said debt in the present action.

Wetmore v. Wetmore, 149 N. Y., 520.
France v. France, 79 Ap. Div. (N. Y.), 291.
Barber v. Barber, Supra.

No good reason seems to exist why a wife whose husband has deserted her, and refuses to perform the duty of maintenance, should not be viewed as an ordinary creditor, with relation to the alimony which a court of justice has awarded her. Her relations under such circumstances are adverse to those of her husband, and, to the extent of her claim, she ought to be classed as a common creditor in fact as in law.

Why, then, should this plaintiff in error be deprived of her moral and legal claim for support, especially when such claim is supported by a decree?

The decree in question ought to be enforced as any other judgment out of any property of the husband wherever found.

Broslough v. Broslough, 68 Pa. St., 495.
Brislowe v. Brislowe, Supra.
Barber v. Barber, Supra.

The decree forever separates the plaintiff in error from the defendant, and that part of the decree is not alterable under Section 1771 of the New York Code. The decree itself, insofar as it affects the alimony, cannot be enforced in the State of New York for want of jurisdiction against

the person of the defendant, and if it cannot be enforced in the State of Connecticut in the present proceedings, then the plaintiff is left absolutely without a remedy.

She is legally separated from her husband under a decree requiring him to support her, and yet such decree, if the ruling of the court below is sustained, cannot be enforced against him.

By this decree the marriage relation, insofar as living together is concerned, has been terminated. The defendant's obligations, springing from the marriage relation, to support the plaintiff have ceased, and in place thereof the decree provides a substitute for such support granted to the wife, and by reasonable implication restricts the defendant's obligations to that extent.

The defendant's obligation under the decree fixes a certain sum of money payable in a certain manner at stipulated periods in lieu of the previous obligation to maintain the plaintiff in error.

The decree created an obligation and is enforceable against the defendant in error as upon his promise to perform it; that promise, of course, is only implied by law. It is true, perhaps, that the defendant in error did not voluntarily assume that obligation, but the decree imposed it upon him. The obligation, therefore, assumed by the defendant in error created and vested a substantial right in the plaintiff in error, and if she is deprived of that right without the actual happening of the contingencies mentioned in Section 1771 of the New York Code of Civil Procedure, it seems to us that the result would be a violation of the constitutional provision, in that the plaintiff in error would be deprived of her right to property without due process of law.

The plaintiff in error's right to support became vested by the court's decree. It fixed her rights definitely, and even though assuming that under appropriate proceedings under Section 1771 of the Code of Civil Procedure the court had the right, as contended by the defendant in error, to change, vary, alter or modify said decree, the plaintiff in error could not be divested of the right to property until the law has divested it. The record in the case at bar discloses that the courts of New York never divested the plaintiff of that right.

If the claims we contend for in this case are sound, even though some cases upon this subject do not support such contention, we invoke the following reasoning of a learned author:

"In spite of the fact that the law consists of reason, and that reason is constantly detecting and pointing out judicial blunders, by means whereof cases wrongfully decided and false doctrines are overruled, it is no novel thing for a bench of judges to accept some thoughtless utterance of a predecessor as though they were reason, without a particle of examination to see whether it is just or false. Indeed, through this sort of abnegation of the office of thinking, our law has been made to linger, and it now remains, in the shadows of the dark ages instead of walking onward with the other sciences, towards the light of a better future."

The cases antagonistic to the claims made by the plaintiff in error, we believe, are based upon the assumption that if a decree of the character to the one at bar is enforced, a possible conflict of jurisdiction may arise.

If we have successfully demonstrated that such result does not follow, the reason that controlled those decisions cease and the alleged law those cases purport to lay down must likewise cease.

Respectfully submitted,

BENJAMIN SLADE,
ROBERT GOELLER,
Counsel for the Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

No. 7.

Supreme Court of the United States.

OCTOBER TERM, 1909.

MATILDA VON ELLERT SISTARE,

PLAINTIFF IN ERROR,

vs.

HORACE RANDALL SISTARE.

Brief of Defendant in Error.

STATEMENT.

On July 22, 1899, in an action between the parties to this suit, a judgment of separation was rendered by the Supreme Court of the State of New York in favor of the present plaintiff as plaintiff therein. This judgment provided in substance:

(1) That the plaintiff should be separated from the bed and board of the defendant on the ground of non-support and cruel treatment;

(2) That the defendant should pay to the plaintiff for her maintenance and support and the maintenance and education of their minor child $22.50 per week;

(3) That the plaintiff should have the custody of the child;

(4) That costs of $117.67 should be recovered and that execution should issue therefor;

(5) That the plaintiff should have leave to apply from time to time for other orders necessary for the enforcement of the judgment and of her rights in the premises.

This is an action to recover the amount of the weekly payments required by the judgment which accrued between the date of its rendition and the date of the commencement of this action and which amount to $5,805 and are unpaid. No evidence was

offered or claim made regarding the costs allowed in said judgment.

The defendant demurred to the complaint and the demurrer was overruled. The parties then joined issue and the case was heard. As the questions raised by the demurrer are substantially the same as those raised by the defendant's claims of law made upon the trial, it is unnecessary to consider them separately.

POINT I.

The statutes of New York show that the order requiring the payment of $22.50 per week was temporary in its nature and enforceable only in the manner provided in such statutes.

The sections of the New York Code of Civil Procedure which we asked the trial court and now ask this Court, under the provisions of the statute, to take judicial notice of, are printed for the sake of convenience in an appendix to this brief. The statutes of New York published by public authority containing these provisions are Laws of New York for 1880, Vol. II, ch. 178 (containing ch. 15 of the Code) and Laws of New York for 1895, Vol. I, ch. 891. The Code of Civil Procedure is also printed in various unofficial forms. The provisions of the Code printed in the appendix are

those in force at the time of the rendition of the said judgment (1899) and which have not, so far as affects the questions raised here, been changed since.

The action in which said judgment was rendered by the Supreme Court of New York was brought under section 1762 of the Code which states the causes for which a judgment of separation may be granted. This section is in the article of the Code entitled "Action for Separation."

Section 1766 provides that in such actions the court may in the judgment require the defendant to provide suitably for the education and maintenance of the children of the marriage and for the support of the plaintiff. This section also authorizes the court to make similar orders without rendering a judgment of separation . Section 1771, however, which requires the court in final judgment to give directions for the custody of the children and for support, etc., is the section under which this order appears to have been made.

Section 1767 provides that upon the joint application of the parties and evidence of reconciliation a judgment of separation may be revoked.

Section 1769 provides that during the pendency of such actions the court may make and modify orders requiring the de-

fendant to make payments for the support of the wife and children. This section further provides that costs may be awarded upon final judgment and that execution may be issued therefor **"as in an ordinary case,"** or that such costs may be collected out of the property sequestered or otherwise in the power of the court.

Section 1771 provides that the court must in such actions upon final judgment, if such orders have not been made before, give such directions as justice requires for the custody, care, education and maintenance of the children of the marriage and for the support of the wife. This action further provides that **"the court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court may prescribe, at any time after final judgment annul, vary or modify such directions."**

Section 1772 provides that the court may order the husband to give security that he will comply with the order for the maintenance of the children and for the support of the wife, and that if he fails to give such security his property may be sequestered and a receiver appointed.

Section 1773 provides that where the husband makes default in paying any sum of money required by such order, and pay-

ment cannot be enforced by the sequestration and receivership proceedings, the court may punish him for contempt.

It is apparent from these statutes that the judgment in question here was rendered in a proceeding entirely foreign to the statutes or practice of the State of Connecticut. The order with respect to the weekly payments was subject to modification or annulment by the court which granted it at any time, and was enforceable in the peculiar method prescribed by the statute.

POINT II.

The New York courts hold that an order of this character is subject to modificaion at any time by the court which granted it independent of statute, and is enforceable only in the method provided by the statute.

The New York statutes expressly provide that the court granting a judgment of separation and ordering the payment of money for the support of the wife and children—in the nature of future alimony—may annul or modify such order at any time. And the New York decisions are that the courts have such power independent of the statutory provision.

Thus in Tonjes vs. Tonjes, 14 Hun. (N. Y.) 542—a case which arose before the

adoption of the amendment to the Code in 1895, expressly authorizing the court to annul or modify orders for future alimony in actions of separation—the Appellate Division of the New York Supreme Court said:

"Under the decisions, it is clear that the sum which is awarded as alimony does not exist as a debt in favor of the wife against the husband in the sense of indebtedness as generally understood; it is founded upon the marital obligation of the husband to maintain and support the wife and children; it is awarded and made specific in amount by the court as incidental to the decree which is entered. The specific sum and allowance which is thus made originates in a duty, is created by the court upon the application of equitable rules, based upon a consideration of the circumstances of the husband and the needs of the wife and children, and is at all times the subject of equitable protection. This principle of equitable protection is not limited to the security of the fund awarded for the purposes for which it was created, but it is, within the principle of the cases above cited, extended to and coversthe whole subjectmatter of enforcing the obligation which rests upon the husband to maintain and support the wife. This is the primary duty, and for this purpose equity creates the fund. We think, therefore, that it is clearly within the equitable power of the court, not only to tentatively fix the sum which shall be paid at the time the decree is rendered, but to provide in the decree for a reservation of such ques-

tion to await any change of condition in the circumstances of the parties which may require the interposition of equitable power to work justice by an enforcement of the primary obligation. * * * If, however, no provision were made in a judgment in an action for separation, reserving the right in the court to subsequently modify or change the same, still we think such power exists. * * * As the decree awarding alimony in an action of separation is of equitable creation, based upon the marital obligation to maintain, when that support is swept away, equity will, upon proper application, decree that the former obligation created by the judgment is also swept away. **It seems plain, therefore, that in actions for separation, where the obligation to support and maintain is a continuing one, it is at all times within the power of a court of equity to take cognizance of this subject, although there exists no special statutory authority upon the subject.''**

The order in question, moreover, is not only subject to modification at any time, but, under the New York decisions, can only be enforced by the sequestration and contempt proceedings provided in the statutes.

Thus in Weber vs. Weber, 93 Hun. N. Y. 149, it was held that the remedy of a wife upon the refusal of the husband to pay alimony in an action for separation was under Section 1772 and 1773 of the Code—the sections relating to sequestration and contempt proceedings—and that an execution

could not be issued nor supplemental proceedings instituted. The court in that case, after pointing out that the order was made under Sections 1769 and 1771 of the Code, said:

"An order for the support of a wife and children is not an order which simply directs the payment of a sum of money. Maintenance and support may involve the payment by the husband of various sums of money at various times necessary to accomplish that purpose. Section 779 of the Code (the section relating to executions) was intended to apply to an order directing the payment of a sum of money, the provisions of which order will be satisfied upon payment being made as in the case of a judgment for a sum of money, where the payment of the amount specified satisfies the judgment. It was recognized that where a husband is required to make payments from time to time for the support of his wife and children, enforcement of such an order by execution under section 779 of the Code would be ineffectual; and a special proceeding was authorized which would accomplish that purpose; and that proceeding having been prescribed, it would seem to follow that the enforcement of the order must be in accordance with it.

"We think, therefore, that an execution under section 779 of the Code to enforce the order requiring the defendant to pay for the maintenance of his wife was not authorized and this proceeding cannot be maintained."

And in Brauth vs. Brauth, 20 Civ. Pro. 33 (N. Y.) it appeared that a judgment of separation had been rendered under the New York statute directing the defendant to pay $5 a week alimony and also a counsel fee and costs. Proceedings were instituted under section 1773 of the Code to punish the defendant for contempt in failing to pay the counsel fee and costs. But the court distinguished between the provisions of the decree relating to the payment of alimony and those relating to counsel fees and costs, saying:

"The power to commit for non-payment does not extend to the costs and allowances contained in the final judgment. In fact it is evident that the court does not direct the payment of such costs in a judgment of that description, but simply allows a recovery of the same and permits judgment to be entered therefor, **in this respect differing very materially from the provisions of a judgment for the payment of alimony in respect to which no judgment can be entered and which can only be collected by the proceeding authorized by the Code.**"

It follows, therefore, that the judgment or order sought to be enforced in this action is an order which is subject to modification at any time by the court which granted it, and that it can be enforced in New York only in the method provided by the statutes of that State. The questions then presented here are:

(1) Whether a judgment of a court of another state which is not final, but is subject to modification by the court which granted it will be enforced in this State.

(2) Whether a judgment which can be enforced in the state where it was obtained only in a special statutory way will be enforced in an ordinary action in this state.

POINT III.

The courts of one state will not enforce the judgments of the courts of another state which are subject to modification and are not final judgments for fixed sums of money.

The question whether judgments similar to the order in question rendered in one state will be enforced by the courts of another state, has generally arisen in cases of future alimony—that is where a court in divorce proceedings, has made an order for the payment of money in installments in the future, and the judgment is sued upon in another state. The principles involved in these cases are similar to those arising in the present case, although the peculiar statutory provisions existing in New York for the enforcement of the judgment are not usually present. Up to a comparatively recent time the decisions of the courts in this country have been widely at variance upon

the question whether such judgments for future alimony were enforceable. Many of the decisions are based upon the early case of Barber vs. Barber, 21 How. (U. S.) 582. This case, however, as we shall show, has been distinguished in several leading cases and in effect overruled by the Supreme Court of the United States and can no longer be regarded as an authority. The most recent cases by the highest courts of this country, including the Supreme Court of the United States, the Court of Appeals of the State of New York, the Supreme Judicial Court of Massachusetts, and the Federal Circuit Court of Appeals, all hold that judgments for future alimony rendered in one state will not be enforced by the courts of another state, even for the amount of such alimony as shall have accrued prior to the commencement of the suit to enforce such judgment.

The leading case upon this subject and which is of peculiar importance as it embodies the decisions both of the New York Court of Appeals and of the Supreme Court of the United States is that of Lynde vs. Lynde, 162 N. Y. 405, and 181 U. S. 183. In that case a judgment for separation was recovered in New Jersey under statutes similar to the New York statutes to which we have referred. Action was brought in New York to enforce the judgment . The

judgment in New Jersey gave judgment, (1) for a specific sum for alimony due between the commencement of the action and the time the judgment was rendered and counsel fees; (2) directed the payment of future alimony and (3) required the payment of costs. At a trial had at a special term in New York state, judgment was granted (1) for the specific amount fixed in the New Jersey judgment; (2) the alimony due from the time of the entry of the New Jersey judgment down to the trial in New York state ,and (3) the costs. The judgment also allowed the same remedies for sequestration, receivership, etc., authorized by the New Jersey statute. This New York judgment was modified on appeal by the Appellate Division by **striking out the judgment for alimony due since the entry of the New Jersey judgment** and the provisions for sequestration, receivership, etc. This judgment so modified was affirmed by the New York Court of Appeals and afterwards by the United States Supreme Court.

In its decision the New York Court of Appeals said: (162 N. Y. 417)

"The action was to recover upon a final decree of the court of another state, which being rendered with jurisdiction over the person of the defendant, is to be deemed conclusive, in so far as it adjudged the defendant to be indebted to the plaintiff at the date of its rendition. The proceeding in

chancery had terminated in an unconditional decree that the defendant pay a definite sum of money, established as a debt against him, and, therefore it had extra territorial value and force. As a debt of record against the defendant the courts of this state should give it full credit and effect; **but as to its other provisions for future alimony and for equitable remedies to enforce compliance, I do not think we should say that it falls within the rule of the Federal Constitution.** * * * So far as it made provision for the payment of alimony in the future, it remained subject to the discretion of the chancellor and lacked conclusiveness of character . The chancellor's action was not final on the subject. As he observed in Lynde vs. Lynde (54 N. J. Eq. 473) referring to the law of New Jersey: 'The statute exhibits an intention that the subject shall be continuously dealt wih according to the varying condition and circumstances of the party.' The provision of the Federal Constitution which requires that full faith and credt shall be given to the judicial proceedings of another state, in my opinion, shall be deemed to relate to judgment or decrees which not only are conclusive in the jurisdiction where rendered, but which are final in their nature."

The Supreme Court of the United States in affirming this decision (181 U. S. 187) after pointing out that the New Jersey judgment included an item of $7,840 for alimony which had accrued prior to its rendition and $1,000 allowance for counsel fees said:

"The decree for the payment of $8,840 was for a fixed sum already due and the judgment of the court below was properly restricted to that. The provision for the payment of alimony in the future was subject to the discretion of the Court of Chancery of New Jersey which it might at any time alter and was not a final judgment for a fixed sum."

In the Lynde case the Court of Appeals also distinguishes the case of Barber vs. Barber, 21 How. U. S. 582, and shows that the real question in that case was as to the equitable jurisdiction of the Federal Courts and that the question here raised was not involved in the decison.

It must be borne in mind in considering these decisions that the question is not whether the judgment had been in fact altered or changed, but whether it is a judgment which the court which granted it retains power to change or alter. If so, the judgment is not a final judgment for a fixed sum of money. If the New York court had power to change or alter the judgment in question it was not a final judgment within the decision in Lynde vs. Lynde, irrespective of the question whether the court has changed it. And if it were not a final judgment it is not entitled to faith and credit under the provisions of the Constitution of the United States and should not be enforced through comity.

Other very recent cases of the United States Supreme Court supporting our position are Audobon vs. Shufeldt, 181 U. S. 577 and Wetmore vs. Wetmore, 196 U. S. 68.

In the very recent case of Page vs. Page 189 Mass. 85, the Supreme Court of Massachusetts considered the question here presented at length and held in an action to recover accrued alimony that a decree rendered in another State ordering future payments of alimony, which was subject to revision by the court which granted it, would not be enforced by the Massachusetts courts. The court after considering the early conflict of authorities, said:

"But the question whether a decree for the future payment of alimony which is subject to the revision of the court is a final decree and comes within the protection of the constitutional provision seems to have been recently settled by the Supreme Court of the United States (quoting the Lynde case) * * * This decision of the Federal Court is an authoritative declaration of the interpretation of the provisions of the Federal Constitution under consideration, and is binding upon this court. In order to bring herself under the protection of this provison the plantiff must therefore show that the decree was final. * * * So far, therefore, as the plaintiff relies upon this constitutional provision, she has not stated a case."

And in the case of Israel vs. Israel, 148

Fed. 576, published Jan. 24, 1907, the Federal Circuit Court of Appeals held with respect to a judgment for future alimony under the very New York statutes which we have considered, that a decree for alimony will support an action in another State only in so far as it is for a sum due at the time of its rendition, and which is absolutely awarded, but not with respect to future payments, for which it provides, but as to which it remains subject to modification at any time, in the discretion of the court. The court said:

"It appears that under the statutes of New York the judgment or decree so far as it directed the payment of alimony and maintenance not then accrued or payable could at any time thereafter be annulled, varied or modified by the court rendering it. It, therefore, was not a conclusive and final judgment or decree with respect to the $2,010 representing alimony and maintenance for sixty-seven weeks accruing after the rendition. It did not constitute a fixed, unconditional and absolute liability for its payment. Any rule which would allow suit to be brought in another State on such a judgment or decree for future alimony and maintenance would directly tend to the creation of confusion, embarrassment and conflict between courts."

The decision in Arrington vs. Arrington, 127 N. C. 190, is one of the more recent decisions most frequently cited as sustaining the position of the plaintiff here. But

the Supreme Court of North Carolina when the case came again before it (131 N. C. 143) admitted that its earlier decision was wrong, saying.

"When this case was here before, two members of the court dissented, giving as one ground of dissent that the **causa litis** being a judgment for future alimony, was interlocutory and an action could not be maintained thereon, citing Lynde vs. Lynde, 162 N. Y. 418; which has been since sustained on writ of error, 181 U. S. 183. But the majorty of this court sustained plaintiff's contention that it was a final judgment and, therefore, an action could be maintained upon it. Now that the defendant has obtained his discharge in bankruptcy, the plaintiff is again before the court contending that the Illinois judgment for alimony was not a final judgment, and hence the discharge in bankruptcy does not release defendant's liability. **In view of the subsequent decision of the Federal Supreme Court above cited, it may be said here that if this matter were before us on a re-hearing we would reverse our former decision.**"

These decisions demonstrate beyond controversy that the order for the future payment of money sought to be enforced here, and which is subject to modification by the New York courts, is not a final judgment for a fixed sum of money entitled to full faith and credit under the provisions of the Federal Constitution. And if it is not enforceable here as a matter of right, the

following language of the Supreme Court of Illinois may well be adopted as showing why it should not be enforced through mere comity:

"The decree for alimony may be changed from time to time by the chancellor and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, when he is in arrears in payments required under the decree. * * * The peculiar character of the obligation is such that it is always subject to modification by the court in which the decree was entered, according to the varying circumstances of the parties, and no other court would undertake to administer the relief to which the parties are entitled, except that having jurisdiction in the original suit. Any attempt to do so by such other court would bring about a conflict of authority and a condition of chaos with reference to questions of this character, because no other court would have before it the facts with referenc to such change in conditions and as to such original rights of the parties." (Barclay vs. Barclay, 184 Ill. 375.)

And in the Page case (189 Mass. 92), already referred to, the Supreme Court of Massachusetts, after showing that the judgment in question did not come within the constitutional provision, said with respect to comity:

"So far, therefore, as the plaintiff relies upon this constitutional provision, she

has not stated a case . So far as independently of that provision she asks the assistance of this court as in a case of a foreign judgment, she is met by the same difficulty. It does not appear that she has any positive or final decree for the payment of a sum certain or which can be made certain. The fair construction of the bill taken in connection with the nature of the decree is that she has no such final decree. For aught that appears ,the Maine Court might revise the decree and decline to issue any process for the collection of any sum whatever."

Suppose in the present case the judgment of the Superior Court should be allowed to stand, and the Supreme Court of New York, upon application being made, and it being shown that the situation of the parties has changed, should forthwith modify its order and remit the whole or part of the payments in arrears. The situation which would arise illustrates the confusion necessarily attendant upon the enforcement in one state of orders made by courts of another state which remain subject to modification.

POINT IV.

The courts of one state will not enforce by judgment and execution orders of courts of another state enforceable in such state only by special statutory proceedings.

The courts of one state will not enforce the judgments of courts of another state which are subject to modification. The more clearly will they not enforce such orders by judgment and execution where the courts of the state where the judgment was obtained, decline to enforce them in any such way.

As already pointed out, the New York statutes provide for the enforcement of maintenance and support orders in judgments of separation by means of sequestration, receivership and contempt proceedings. The New York courts hold, in the cases referred to, that such orders are not enforceable by execution but only though the peculiar statutory proceedings.

It appears from the complaint that the plaintiff resides in New York and the defendant in New Jersey and it does not appear that either ever resided in Connecticut. The ground upon which it can be claimed that the courts of Connecticut should interfere and enforce an order of a New York court in a manner in which the New York courts themselves say such orders are not enforceable, is not apparent.

CONCLUSION.

For the reasons stated, it is respectfully urged that the order sought to be enforced in this action is not a judgment which the courts of the State of Connecticut are bound to enforce under the provisions of the Constitution of the United States, and that it is not a judgment which should be enforced through comity alone.

Respectfully submitted,

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APPENDIX.

SECTIONS OF NEW YORK CODE OF CIVIL PROCEDURE, Chapter XV, Article Third entitled "Actions for a separation" (Secs. 1762-1767) and Article Fourth entitled "Provisions applicable to two or more of the actions specified in this title" (Secs. 1768-1774.)

§ 1762. For what causes action may be maintained.

In either of the cases specified in the next section, an action may be maintained, by a husband or wife, against the other party to the marriage, to procure a judgment, separating the parties from bed and board, forever, or for a limited time, for either of the following causes:

1. The cruel and inhuman treatment of the plaintiff by the defendant.

2. Such conduct on the part of the defendant towards the plaintiff, as may render it unsafe and improper for the former to cohabit, with the latter.

3. The abandonment of the plaintiff by the defendant.

4. Where the wife is plaintiff, the neglect or refusal of the defendant to provide for her.

§ 1763. Id.; in what cases.

Such an action may be maintained in either of the following cases:

1. Where both parties are residents of the State, when the action is commenced.

2. Where the parties were married within the State, and the plaintiff is a resident thereof, when the action is commenced.

3. Where the parties, having been married without the State, have become residents of the State, and have continued to be residents thereof at least one year; and the plaintiff is such a resident, when the action is commenced.

§ 1766. Support, maintenance, etc. of wife and children.

Where the action is brought by the wife, the Court may, in the final judgment of separation, give such directions, as the nature and circumstances of the case require. In particular, it may compel the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties, and the court may, in such an action render a judgment compelling the defendant to make the provision specified in this section where, under the circumstances of the case, such a judgment is proper, without rendering a judgment for separation.

§ 1767. Judgment for separation may be revoked.

Upon the joint application of the parties, accompanied with satisfactory evidence of their reconcilation, a judgment for a separa-

tion, forever, or for a limited period, rendered as prescribed in this article, may be revoked, at any time by the court which rendered it, subject to such regulations and restrictions as the Court thinks fit to impose.

§ 1769. Alimony, expenses of action, and costs: how awarded.

Where an action is brought, as prescribed in either of the last two articles, the Court, may, in its discretion, during the pendency thereof, from time to time, make and modify an order or orders, requiring the husband to pay any sum or sums of money, necessary to enable the wife to carry on or to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. The final judgment in such an action may award costs, in favor of or against either party, and an execution may be issued for the collection thereof, as in an ordinary case; or the Court may, in the judgment, or by an order made at any time, direct the costs to be paid out of any property sequestered, or otherwise in the power of the court.

§ 1771. Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the Court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by

one or more orders, made from time to time, before final judgment, such directions, as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The Court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the Court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the Court by order made upon or without notice as the Court in its discretion may deem proper after presentation to the Court of satisfactory proof that justice requires that such an application should be entertained.

§ 1772. Support, maintenance, etc., of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the Court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give

the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in Section 1769 of this act; the Court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the Court, to the payment of any of the sums of money specified in this section, as justice requires.

§ 1773. Id.; when enforced by punishment for contempt.

Where the husband makes default in paying any sum of money specified in the last section, as required by the judgment or order directing the payment thereof; and it appears presumptively, to the satisfaction of the Court, that payment cannot be enforced by means of the proceedings prescribed in the last section, or by resorting to the security, if any, given as therein prescribed, the Court may, in its discretion, make an order requiring the husband to show cause before it, at a time and place therein specified, why he should not be punished for his failure to make the payment; and thereupon proceedings must be taken to punish him, as prescribed in title third of chapter seventeenth of this

act. Such an order to show cause may also be made, without any previous sequestration, or direction to give security, where the court is satisfied that they would be ineffectual.